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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ....

UTAH PUBLIC SERVICE COMMISSION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY, ET AL, *Appellees*

On Appeal from the United States District Court for the District of Utah

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JURISDICTIONAL STATEMENT

The Utah Public Service Commission, Appellant and Intervenor in *United States* v. *El Paso Natural Gas Co., et al.*, designated civil action number C-143-57 in the United States District Court for the District of Utah, appeals from the final judgment of the district court selecting Colorado Interstate Gas Company (CIG) as the successful applicant for the acquisition of the New Company created by divestiture pursuant to the mandates of this Court in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). The selection of CIG perpetuates

rather than eliminates the economic concentration in the highly concentrated natural gas transmission industry condemned by this Court in *El Paso* and independently violates Section 7 of the Clayton Act.

OPINION BELOW

The tentative Opinion, Findings of Fact and Conclusions of Law of the district court dated June 21, 1968, are not fully reported. They are partially reported in 1968 CCH Trade Cases, ¶ 72,533 (D Utah, 1968.) The Final Judgment, Opinion and Amended Findings of Fact and Conclusions of Law of the district court dated August 29, 1968, are not reported, nor is the Order of the court dated November 7, 1968, granting El Paso Natural Gas Company's motion to amend Findings of Fact and to amend Judgment. Copies of these documents are set forth consecutively in the Appendix at pages 37-141.

JURISDICTION

This action is a civil suit brought by the United States under Section 7 of the Clayton Act, 28 Stat. 731, as amended, 15 U.S.C. 18. The proceedings below in this case involve the divestiture required by the mandates of this Court in *El Paso* and *Cascade* to remedy the illegal acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company. The Tentative Opinion, Findings of Fact and Conclusions of Law of the District Court were entered June 21, 1968 and the Final Judgment, Findings of Fact and Conclusions of Law were entered on August 29, 1968 and docketed on September 3, 1968. On September 6, 1968, El Paso filed a Motion to Amend Findings of Fact and to Amend Judgment. El Paso's motion only

requested that the Final Judgment of the court of August 29, 1968, be amended in two respects, that is to exclude two non-utility investments, Phillips Pacific Chemical Company and Pacific Northwest Realty Company, from the assets to be divested by El Paso to CIG. The court's Tentative Opinion of June 21, 1968, had provided for the divestment of these assets but the Implementing Documents filed by El Paso and CIG prior to the August 23 hearing on the objections to the court's Tentative Opinion and the court's August 29 Final Judgment did not provide that such assets were to be acquired by CIG. At the August 23 hearing CIG noted that there was no objection to the exclusion of such assets. (Tr.-10,009.) The court, in any event, heard El Paso's Motion to Amend on November 7, 1968. The court expressly noted at that hearing that the court's "failure to provide for the retention by El Paso of those two investments of Pacific Chemical and the Pacific Northwest Realty was merely an *oversight.*" (Tr.-11,055.) (Emphasis Supplied.) On November 7, 1968 the court entered an order granting El Paso's Motion to Amend Findings and to Amend Judgment. The court's Order was docketed on the same date. The court's Order provided in part:

> IT IS FURTHER ORDERED that except as amended hereby, the Findings of Fact, Conclusions of Law and Opinion of the Court entered by the Court's Order of August 29, 1968, shall remain in full force and effect and this Order as amended hereby is declared to be a final judgment from which appeal may be taken.

The Appellant doubts that El Paso's Motion to Amend sought reconsideration of "basic findings of fact." *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 177 (1944). The Appellant, Utah Public Service Commission, filed a

Notice of Appeal in the United States District Court for the District of Utah on September 18, 1968, and filed a second Notice of Appeal in the same court on November 13, 1968, in order to obviate any question as to the finality of the judgment from which this appeal was taken. The jurisdiction of this Court to review the Final Judgment of the district court on direct appeal is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29; *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, *supra; Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *E. I. du Pont de Nemours*, 366 U.S. 316 (1961).

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jursidiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

QUESTIONS PRESENTED

Whether CIG's acquisition of New Company, on the undisputed facts, foreclosed potential competition in the sale of natural gas in the California market in violation of Section 7 of the Clayton Act?

Whether CIG's acquisition of New Company, on the undisputed facts, eliminated competition for the acquisition of gas reserves in Wyoming in violation of Section 7 of the Clayton Act?

Whether CIG's acquisition of New Company was, on the undisputed facts, an acquisition, the effect of which "may be substantially to lessen competition" in the sale of natural gas in Utah and Western Colorado in violation of Section 7 of the Clayton Act?

Whether CIG's acquisition of New Company, extending CIG's market monopoly from Eastern Colorado to the Pacific Northwest and enhancing its monopoly power, violated Section 7 of the Clayton Act?

Whether Section 7 of the Clayton Act and the mandates of this Court sanction the selection of CIG as the successful applicant for New Company when such selection leaves a substantial likelihood that the tendency toward monopoly previously condemned by this Court has has not been eliminated and alternative means of divestiture remain?

STATEMENT OF THE CASE

Once more, nearly five years after this Court first spoke, after 11 years of litigation, three appeals to this Court and two mandates of this Court requiring divestiture without delay, a district court with the ambivalent participation of the Justice Department has once again nullified the effective enforcement of Section 7 of the Clayton Act.

HISTORY OF THE CASE

This civil antitrust action was commenced on July 22, 1957, by the United States, alleging that El Paso Natural Gas Company's (El Paso) acquisition of Pacific Northwest Pipeline Corporation (Pacific Northwest) violated Section 7 of the Clayton Act. This litigation has been before this Court on three occasions. This Court in *California* v. *Federal Power Cimmission,* 359 U.S. 482 (1962) held that the Federal Power Commission should stay administrative action on the El Paso-Pacific Northwest merger pending the determination of whether the merger violated Section 7. After trial this Court in *United States* v. *El Paso Natural Gas Co., supra,* reversed the judgment of the district court and held that the acquisition of Pacific Northwest by El Paso violated Section 7 of the Clayton Act. This Court in *El Paso* ordered divestiture without delay. Finally, nearly three years later, this Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* held that the appellants on that appeal were entitled to intervene as of right under Rule 24 of the Federal Rules of Civil Procedure and that the divestiture decree agreed upon by the Department of Justice and El Paso failed to comply with the mandate of this Court in *El Paso.* This Court again, in *Cascade,* reversed and remanded, with directions that there be divestiture without delay, that a new District Judge be appointed to hear the case and that *de novo* hearings be conducted on the type of divestiture in accordance with the mandates and guidelines of this Court in *El Paso* and *Cascade.*

On remand the Honorable Hatfield Chilson, United States District Judge for the District of Colorado, was assigned to the District of Utah to conduct the further

divestiture proceedings required by *Cascade*. The court granted 26 motions to intervene, including the Appellant's, Utah Public Service Commission. *De novo* hearings were held from October 16, 1967 until March 21, 1968. Nine applicants for acquisition and 22 intervenors, including the Utah Public Service Commission, participated in these proceedings.

On June 21, 1968, after argument, the court entered its Findings of Fact, Conclusions of Law and Opinion. In its Opinion the court stated that its Findings of Fact, Conclusions of Law and Opinion:

> Are tentative and interlocutory in character and will remain so until after parties in interest have had an opportunity to object to the findings and determinations of the Court, be heard thereon and their objections ruled upon by the Court. (Ct's. Op., June 21, 1968, at pp. 108.)

Interested parties, including the Utah Public Service Commission filed detailed objections which were heard on August 23, 1968 and on August 29, 1968 the court overruled the Utah Public Service Commission's objections and entered a final judgment making its Findings of Fact, Conclusions of Law and Opinion, with minor modification, its Final Judgment of Divestiture.

The district court's Final Judgment of Divestiture selected CIG as the successful applicant to acquire New Company and tailored its plan to fit that selection. (Ct's. Op., June 21, 1968, at p. 82-83.) The court directed that specified assets be divested to Northwest Pipeline Corporation (New Company) and that CIG acquire all of that company's outstanding stock in exchange for five million dollars, CIG common in an amount to be agreed upon by CIG and El

Paso, and the assumption by New Company of approximately 170 million dollars of El Paso's bond and debenture debt.

It may come as a surprise to a Court that almost two years ago issued its second mandate requiring divestiture "without delay" and ordered that a new company "at once be restored," to discover that El Paso is still in control of the assets of Pacific Northwest and will remain so until the conclusion of all appeals in this litigation and until the requisite approvals have been obtained from the Federal Power Commission. (See Implementing Documents approved by the lower court November 7, 1968.) The evidence indicates that the continued operation of the Pacific Northwest assets by El Paso will not present El Paso with an unbearable burden since El Paso is presently netting $27,000 per day, after taxes, on the operation of these properties. (See California's Revised Motion for Appointment of Receiver and Immediate Transfer of Assets, as Amended and Supplemented, dated September 18, 1968.)

THE FACTS

CIG operates a natural gas transmission system serving Eastern Wyoming, Eastern Colorado and the Anadarko Basin. (See map, Appendix, at p. 131) CIG has no competition in its major markets. (Tr.-2769.)

In 1966 CIG had $260,973,384 in assets, operating revenues of $155,555,012 and net income of $12,641,420. Its revenue from gas sales increased from 18 million dollars in 1952 to $74,494,545 in 1968, or an increase of over 300%. (Tr.-2549, CIG-X1.) In 1966, it sold 344 billion cubic feet of natural gas and its natural gas sales accounted for 42%

of its net profit. (Tr.-2550.) CIG has a debt ratio of less than 50% and produced 37% of its own natural gas. (Tr.-2557, 2621.)

CIG's natural gas transmission system passes through the Continental Divide and interconnects with New Company's natural gas transmission system near Green River, Wyoming. (Tr.-3074; see Map, Appendix, at p. 131.)

CIG, under a contract running until 1976, purchases 100,000 mcf per day from New Company at the Green River interconnection. (Tr.-3035, 2549.)

New Company operates a natural gas transmission system running from the San Juan Basin in New Mexico through Utah to the major markets of the Pacific Northwest. New Company enjoys a complete monopoly in the Pacific Northwest. (Tr.-6491.)

By 1968, New Company operated 3,824 miles of pipeline (Tr.-54), had a gross plant investment of $337,341,000 (El Paso Plan of Divestiture, X12), total assets of $327,646,000 (CIG Plan of Divestiture, X4), and sold 363 billion cubic feet of gas per year. (El Paso Plan of Divestiture, X111, sheet 2.) In 1968 New Company had total gas sales of $118,825,000 and net income after Federal Taxes of $8,092,000. (El Paso Plan of Divestiture, X13.) CIG's senior vice president admitted that the New Company divested by El Paso would be a viable and healthy business entity. (Tr.-2737, 3003-4.)

The acquisition of New Company by CIG will produce an industrial giant having $522,347,000 in total assets and gross receipts of $327,897,000. (CIG Plan of Divestiture, X4, X5, 1968 Estimates.) In terms of gross utility plant,

CIG would become the tenth largest natural gas transmission company in the United States and the fourth largest in the Western United States. CIG X2, p. 1.) It would become the third largest natural gas company in terms of gas sales in the Western United States, exceeded only by El Paso and Pacific Lighting. (CIG X2, p. 2.)

Although CIG and New Company together will have 14.7 trillion cubic feet of natural gas reserves, both companies will have to substantially add to their existing reserves to serve the near term incremental demands of their existing markets. CIG testified that the system and reserves divested to New Company would satisfy the requirements of New Company's present markets through the 1968-69 winter season, assuming that the second Sumas Agreement was approved by the Canadian National Energy Board (Tr.-2634-35), and that after the 1968-69 winter season an additional gas supply would be required. (Tr.-3069, 3096.) Commencing in 1957, CIG had an oversupply of natural gas. (Tr.-2676.) CIG, however, testified that it would soon be out of its oversupply situation and CIG, since 1966, has been acquiring gas reserves in Wyoming, which CIG testified as "the bright spot . . . the area that has the most promise as far as our system is concerned." (Tr.-3038, 3034.) CIG estimated that it could meet the incremental demand of the eastern Slope with its present supply of facilities through the 1969-70 season and with limited expenses and improvements could meet the demands of that market through the 1975-76 winter season. (Tr.-2662.)

CIG presently draws the largest share — approximately 80% — of its present gas supply from the Anadarko Basin. New Company now draws its gas supply from the

San Juan Basin, Canada and the Big Piney Field of the Green River Basin. New Company draws 19% of its supply from the Green River Basin. (Tr.-2651.) CIG only draws five per cent of its supply from the same area (Tr.-2658) in the Deseret Springs Field, 75 miles distant from the Big Piney area. *Id.*

Competition, however, for reserves in the Anadarko Basin is substantial and, consequently, CIG has only been able to modestly add to its reserves in that area. (Tr.-2787, 3050-57.) CIG, consequently, repeatedly testified that it considered the Green River and Wind River Basins of Wyoming as the "bright spot" for the acquisition of future reserves. (Tr.-2670, 3005, 3038, 3093, 3095, *accord* Southern Companies X18.) CIG had acquired reserves in the Wind River Basin which it relinquished upon the failure of the Rock Springs project. (Tr.-3179.) CIG could not estimate its own reserves in the Green River Basin, let alone the potentiality of future reserves on uncommitted acreage. All CIG could say was that the Green River and Wind River Basins in Wyoming represented "tremendous potential." (Tr.-3006-08, 3095.) Thus, CIG, in its 1966 Annual Report to its stockholders, stated:

> The prospect for future gas supply additions in Wyoming within economically feasible distance of the pipeline is considered excellent. (CIG 1966 Annual Report, p. 4, CIG plan of Divestiture, X1.)

From the evidence introduced by CIG itself, it is uncontrovertibly clear that both New Company and CIG will have to acquire new reserves to meet the existing demands of their present markets in the near future and that both companies will have to look to the Green River and Wind River Basins in Wyoming to acquire such reserves. CIG

recognized that both New Company and CIG would have to look to the Wyoming area to develop reserves for a California project since there was not sufficient potential in the San Juan Basin. (Tr.-2669-70, 3008.) Even CIG would not testify that there was no possibility of competition between CIG and New Company for the acquisition of reserves in the Green River and Wind River Basins of Wyoming. (Tr.-3182, 3064, 3093.) Indeed, the probability of future competition is substantiated by the location of both companies' natural gas transmission systems in the Green River Basin, the immediate need of both companies to develop future reserves and the admitted vast potential of the Wyoming basins

The annual incremental demand of the California market is still booming and remains in the range of 200 million cubic feet per day. (Tr.-1058.) Since the original merger of El Paso and Pacific Northwest, the competitive situation has been altered. Transwestern now serves Southern California from the Delaware and Anadarko Basins. Since the construction of Transwestern's pipeline, Transwestern has been acquired by Texas Eastern, which ranks first in the nation in terms of total gas sales. PG&E has acquired Canadian gas through Pacific Gas Transmission, its wholly owned subsidiary. El Paso, itself, has more than doubled its natural gas sales. (Cts. Op. at p. 95. Nevertheless, it is evident from the record that California still presents a great commercial opportunity. The Southern Companies have stated that their incremental market requirements are sufficient to support a pipeline to California by 1970. (Cts. Op. at p. 95.) Southern California Edison's Exhibit 1 was an offer by Edison to purchase not less than 300,000 mcf per day. (Ed. X1.) The record, moreover,

amply demonstrates that California purchasers have been consistently willing to pay more than existing rates to finance new California competition. (El Paso Ex. 109.)

CIG is obviously a potential competitor for the incremental California market. CIG's lines are presently located 550 miles from the California market at Station 6 in the Green River Basin. CIG admittedly has the financial ability to mount a California project. (Tr.-2782-83.) CIG certainly claimed the management know-how to mount such a project. (Tr.-2829.) CIG, moreover, since the El Paso-Pacific Northwest merger, has made a major effort to enter the California market.

In the Rock Springs project, commenced in 1958, CIG entered into a joint venture with El Paso to supply gas to the California market. CIG was to construct, own and operate the portion of the pipeline running from Rock Springs, Wyoming, in the Green River Basin to Thistle, Utah. El Paso was to build, own and operate the portion of the pipeline running from Thistle, Utah, to the California border. Initial delivery was to be 400,000 mcf per day. Of this quantity, CIG was to furnish 300,000 mcf. (Tr.-2555. 2970-73.) The Rock Springs project terminated in 1963 when the FPC denied certification.

CIG estimated that initially a California project would require three trillion cubic feet of gas reserves. (Tr.-2664, 3006.) CIG claimed that CIG does not now have the gas reserves to serve the incremental demands of the California market. The lack of existing reserves is the only reason CIG gave in support of its claim that it could not now compete for the incremental demands of the California market. (Tr.-2665, 2676, 2788, 2829, 2878, 3050.)

All parties, however, recognized that neither CIG nor New Company, separately or jointly, at this time have existing reserves to serve the incremental demand of the California market. (Tr.-2634, 3069, 3090, 3096; Cts. Op., at p. 78.) Everyone recognized that for either New Company or CIG to mount a California project would require the development of additional reserves. Furthermore, CIG testified that Canadian gas was too high priced to compete for the incremental demands of the California market. (Tr.-2666, 2766.) The facts are, therefore, that CIG has the proximity to the California market, the financial ability to mount a project to the California market, and its present lines are located in Wyoming which has the potential to develop the reserves required by a California project. (Tr.-2670-71, 3005-08, 3022, 3093, 3095-96.) Finally, CIG consistently told the lower court that CIG had demonstrated the ability to acquire a substantial reserve in a limited period of time (Tr.-2624, 2676) and gave as proof of its ability to acquire substantial reserves in a short period of time its participation in the Rock Springs project, which was a project to supply the incremental demand of the California market. (Tr.-2624.) Thus, Mr. Pelican, Senior Vice President of CIG and President of its Pipeline Division, testified, "The present organization . . . proved its capacity to acquire a substantial reserve in a limited period of time as was evident in our try for the Rock Springs Project . . . ." (Tr.-2624.)

The court below recognized that there were other qualified applicants for the acquisition of New Company. (Cts. Op., at p. 93.) Even CIG admitted that New Company could compete for the California market without CIG. (Tr.-2765-66.) Clearly, if New Company, after eleven years

of El Paso's domination and control remained a competitor for the California market. CIG, with the same proximity, the financial ability, the management and the access to the same reserves, was a competitor for the incremental demand of that market.

CIG and New Company's gas transmission systems interconnect between their major markets in which they have a monopoly. The record contains no precise analysis of whether a new Rocky Mountain project can serve the incremental demand of the Pacific Notrhwest market, but there is abundant evidence to indicate that the growth of that market has been and will continue at a fantastic rate.

In the last ten years, the growth of the natural gas industry in the Pacific Northwest has been "extraordinary." (Kreager Testimony, at p. 13.) From 1957 through 1966, total gas sales in Washington, Oregon and Idaho increased over 200% from 71.6 billion cubic feet to 215.3 billion cubic feet and from $23.2 million to $77.2 million. (Kreager Testimony, at p. 12, WNGCo. X14.) Total ultimate consumers increased 164.4 per cent, from 156,997 in 1967 to 413,490 in 1966. (Kreager Testimony, at p. 13.) The growth of the natural gas industry paralleled the population and industrial growth of the region. In 1967, Puget Sound area of Washington built more new housing units than either Los Angeles, San Francisco-Oakland or San Diego, and general economic growth in the Pacific Northwest is now faster than the State of California. (Kreager Testimony, at pp. 10-11.) In the next 20 years, Pacific Northwest will grow faster than the nation as a whole, particularly in the three-county Puget Sound region surrounding Seattle. (Kreager Testimony, at p. 15.) By 1985, the Puget Sound region is predicted to have a popu-

lation increase over 1965 of 139 per cent, or an increase from a population of 1.5 million to 3.7 million. (WNGCo. X2.) In fact, in the rate of growth, measured by several economic criteria, the Puget Sound region in 1968 was the fastest growing metropolitan area in the nation. Correspondingly, Dr. Kreager, a professional economist, testified, "Demands for natural gas, for both domestic and commercial-industrial purposes, will increase dramatically." (Kreager Testimony, at p. 15.) The Washington Natural Gas Company will add 20,000 new customers per year for the next several years, as compared to the average annual increase of 7,000 new customers per year in the first years of natural gas service in its area. (Thorpe Testimony, at p. 4.) The Washington Natural Gas Company predicted that the natural gas transmission company serving the Northwest area will have to provide additional reserves and facilities to deliver additional annual increments of gas of approximately 65 million cubic feet per day for each of the heating seasons 1969-70 through 1971-72. (Thorpe Testimony, at p. 13.) Finally, it was Dr. Elroy Nelson's opinion that the gas requirements of the Pacific Northwest will increase at a greater rate than anywhere else in the United States. (Tr.-6491-92.)

CIG obviously agreed that the potential growth of the Northwest market was substantial, since it repeatedly testified that it thought the future of that market made the acquisition of New Company attractive regardless of the opportunity to compete in the California market. (Tr.-2793, 2825, 2932.) CIG, of course, has the financial ability and management know-how to mount a Pacific Northwest project on its own, and CIG's transmission system is in closer proximity to the markets of the Northwest than was

Pacific Northwest's system at the time it constructed its lines from the San Juan Basin to that market.

CIG, moreover, did not testify that the incremental demand of the Northwest market was insuffiicient to start a new project to that area. CIG merely testified that the sole reason CIG was not a potential competitor for the Northwest market was that CIG presently did not have an adequate gas supply to mount a project to serve the incremental demand of that market. (Tr.-2650, 3096.) Mr. Pelican, however, admitted that the problem of CIG's acquiring sufficient reserves to mount a Northwest project was the same problem that CIG had in developing sufficient reserves to serve the California market. (Tr.-3096.) Again, CIG's transmission system is presently located in the Wyoming basins in which CIG acknowledges that there is "tremendous potential" for the acquisition of future reserves (Tr.-2670, 3005-8, 3038, 3093, 3095; *accord,* Southern Companies X18.), and CIG's system, which transects the Continental Divide, has access to the development of the reserves in the entire Rocky Mountain area, including Wyoming, which were estimated to be between 40 and 43 trillion cubic feet. (Tr.-7134.)

The record, moreover, indicates that the incremental demand of the Northwest market may well be served by Rocky Mountain as opposed to Canadian gas. Mr. Pelican testified that if the price of Canadian gas increased to the original price of Canadian gas in the Sumas proceedings — 34 cents per mcf — Rocky Mountain gas could compete in the Northwest against that price (Tr.-3088-89.)

CIG's own markets are growing at a far less dramatic rate. While eastern Colorado has also experienced sub-

stantial growth, its growth is far less than the Pacific Northwest's (Tr.-2661-62.) At the present time, CIG predicts that its average annual increase would be 20,000 mcf per day, or about one-tenth of the incremental increase in the California market. (Tr.-2662.) CIG's customers also enjoy favorable rates (Tr.-2649) that would serve as a barrier to new entry.

Appellant concedes that it would be unlikely in the immediate future for New Company to become an actual competitor for the eastern slope market. New Company, however, is a present supplier for CIG for that market and is located in areas in which reserves will undoubtedly have to be developed for that market. (Tr.-3035.) The acquisition of New Company by CIG would enhance CIG's monopoly position on the eastern slope by gaining control of a major supplier and by eliminating the only neighboring natural gas transmission system.

Finally, CIG not only purchases a substantial quantity of natural gas from New Company, but CIG and New Company share several customers in common. Both companies sell to Plateau Natural Gas Company, Western Slope Company and, most important of all to Appellant, Mountain Fuel Supply Company, the natural gas transmission company serving Utah's requirements. (Tr.-2648, 3071.)

The net effect of CIG's acquisition of New Company is that it will extend CIG's monopoly through acquisition from the eastern slope to the Pacific Northwest, enhance its monopoly power in both markets, foreclose competition for the acquisition and development of gas reserves and foreclose potential competition for the California market.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The lower court's decision in this important antitrust case conflicts with the controlling decisions of this Court authoritatively interpreting Section 7 of the Clayton Act. *FTC.* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967); *United States* v. *Von's Grocery Co.,* 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964); *United States* v. *Aluminum Company of America,* 377 U.S. 271 (1964); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); and *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963). After winning its lawsuit in *El Paso* the Government has shown little interest in winning its cause either in Cascade or in the court below. Acquiescence in the acquistion of New Company by CIG will but further encourage the refusal of the lower courts to recognize that effective antitrust enforcement requires not easy but effective divestiture that eliminates the trend toward concentration. See *United States* v. *Aluminum Company of America,* 1967 CCH Trade Cases, ¶ 71,980 judgment vacated, 1967 CCH Trade Cases, ¶ 72,246, on remand from *United States* v. *Aluminum Company of America, supra,* (judgment vacated by stipulation when Alcoa sold Rome to a purchaser other than Okonite); *United States* v. *Kennecott Copper Corp.,* 249 F. Supp. 154 (SDNY, 1965), on remand from the *United States* v. *Kennecott Copper Corp.,* 231 F. Supp. 95 (SDNY, 1964) *aff'd.* 331 U.S. 414 (1965). See also, ADAMS *Dissolution, Divorcement Divestiture: The Pyrrhic Victories* of *Antitrust,* 27 Ind. L.J. 1 (1951).

1. *The selection of CIG forecloses competition for the California market in violation of Section 7.* The lower court found that there were applicants other than CIG that were qualified to make New Company a competitive factor in the California market. (Ct's Op., at p. 93.) The Government and all intervenors who assessed the applicants agreed. (Gov't. Br. of Aug. 19, 1968, at p. 8. The court, however, conceived that it was its responsibility not only to select an applicant qualified to make New Company a competitive factor in the California market, but to select the applicant

> Which in the Court's opinion can and will furnish through New Company, the greatest degree of competition and the greatest impact on the California market. (Court's Op., at p. 93.)

The lower court thus erroneously determined that the mandate of this Court in *Cascade* directing that

> A new company be at once restored to a position where it could compete with El Paso in the California market, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* at p. 136.

sanctioned a deviation from this Court's consistent rejection of the "countervailing power" defense to a Section 7 violation. *United States* v. *Philadelphia National Bank, supra; United States* v. *Penn-Olin Chemical Co., supra;* and *United States* v. *Continental Can Co.,* 378 U.S. 441 (1964).

The court was promoted into adopting this erroneous legal standard by the ubiquitous position of the Government. The Government in its Brief of May 15, 1968, told the Court:

> CIG must be regarded as among the more likely potential independent entrants into the California

> market. (Gov't. Br., May 15, 1968, at p. 31.),

but it then advised the Court:

> We do not think, however, that CIG should be automatically excluded from consideration here because it is now a potential competitor for the California market. If the combination of CIG and New Company were to create a considerably stronger competitor for the California market than either one could possibly be alone, the Court could validly conclude that such a combination is procompetitive rather than anticompetitive, and entirely consistent with the mandate of the Supreme Court. (*ibid,* at p. 32.)

Having proposed an erroneous legal standard the Government could not even suggest to the Court what conclusion was warranted under its application. All it could do was tell the Court that it was "a very close question." (*ibid,* at p. 33.) After the Court entered its tentative findings on June 21, 1968, selecting CIG, the Government, in its objections on August 19, 1968, finally did tell the Court:

> Although the opinion briefly lists a number of competitive advantages which it finds in the CIG application, it makes no finding as to the degree in which the same advantages may be provided by other applicants. In our view the advantage which CIG would be likely to have over the other qualified applicants in a number of the stated respects is, at best, a very small one. (Gov't Br., dated August 1968 at p. 8) (Emphasis Supplied.)

In this respect Appellant notes that on September 30, 1968, the FPC in docket number CP67-187 authorized El Paso Natural Gas Company to construct $118,000,000 in new natural gas facilities and to furnish California with an additional 257 million cubic feet per day to serve the near term incremental demand of the California market. The

Commission, in its decision, rejected the staff recommendation for a 42 inch pipeline. The Commission's action is significant because the district court, in its opinion, placed great weight on the CIG-New Company combination being able to compete for the 42 inch line which would serve all increments to Southern California for the foreseeable future. (Ct's. Op., at pp. 95-96.)

This Court, as early as *Philadelphia National Bank* rejected the "countervailing power" defense since it would serve as a justification for concentration to beget concentration. *United States* v. *Philadelphia National Bank, supra,* at p. 370. It adhered to its ruling in *United States* v. *Continental Can Co., supra,* at p. 464, and in *United States* v. *Penn-Olin Chemical Co., supra,* it again adhered to it when the Court held that the Government had established a *prima facie* violation of Section 7, even though two firms prior to the joint venture entry controlled 90% of the market and even though the district court found that the joint venture would offer greater competition than individual entry by one of the potential competitors. *United States* v. *Penn-Olin Chemical Co., supra,* at pp. 163, 173.

This Court's mandate in *Cascade* did not condone a deviation from this Court's consistent rejection of the "countervailing power" defense. In directing that a competitor be restored that could compete for the California market, this Court in *Cascade* spoke in the context of a divestiture decree that basically provided for a division of markets, with the Pacific Northwest market going to New Company and the California market to El Paso. Its mandate spoke to that situation and looked to a divestiture of a competitor that could compete in the California market, but this Court made clear that the criterion that shaped

its mandate was the enforcement of Section 7 of the Clayton Act. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* at p. 142.

The district court dismissed CIG's competitive effort to enter the California market in the Rock Springs project as "one incident." (Ct's. Op., at p. 101. The lower court stated that

> Acting alone, its (CIG's) potential for being a competitor in the California market in the foreseeable future is so uncertain that it should not be grounds for the exclusion of CIG from consideratoin." (Ct's. Op., at p. 101.

Clearly, on the undisputed and objective facts, CIG is a potential competitor of the California market. Even the Government reached that conclusion. The California market is still rapidly expanding and the potentiality for new competition exists. CIG has proximity to the market. CIG's lines now pierce the Continental Divide at a point 550 miles from the California market. Indeed, its transmission system now extends further west than any other pipeline not presently serving the California market and at a point from which CIG mounted the Rock Springs project. CIG admittedly has the financial ability and the managerial know-how to finance, construct and operate an entry into the California market. CIG has immediate access to the vast reserves of the Wyoming basins, part of which it relinquished on the failure of the Rock Springs project and it can, with comparative ease, reach reserves in other areas of the Rocky Mountain region. Certainly it is in a better location to mount a California project than was Transwestern when it built its lines to California from the Permian Basin.

CIG's subjective disclaimer of any intent to compete in the California market cannot overcome these undisputed and objective economic facts. *FTC* v. *Procter & Gamble Co., supra,* and *United States* v. *Penn-Olin Chemical Corp., supra.* CIG's disclaimer, moreover, cannot rest on the reason that CIG advances in support of it. CIG states that the reason that it cannot compete in California is that it does not have the present existing reserves for such a project. The fact is that CIG has the ability to develop such reserves in the area of its present transmission system. Finally, CIG's disclaimer is belied by CIG's participation in the Rock Springs Project. Obviously CIG is not only a present potential competitor for the California market, but for five years, from 1958 through 1963, it actually attempted to enter that market.

This Court has recognized the importance of potential competition in ascertaining the anticompetitive effect of a corporate acquisition or joint venture under Section 7 of the Clayton Act. *FTC* v. *Procter & Gamble Co., supra,* and *United States* v. *Penn-Olin Chemical Corp., supra.* In *Penn-Olin* this Court held that the foreclosure of potential competition established a *prima facie* violation of Section 7 even though there was no showing that the potential competitors had had any significant influence prior to entry on the market in question and even though one of the competitors was not presently engaged in the line of commerce in question.

Potential competition, as this Court recognized in *El Paso,* is of even greater significance in the natural gas industry. Indeed, in the natural gas industry it is difficult to draw a line between potential and actual competition. The competition that exists is competition for the incre-

mental demand of a market. The competitive opportunity to serve such demands are infrequent. The contracts for the sale of natural gas involve large quantities, are for long terms and frequently require that the successful competitor construct new facilities over many miles to serve a new market. This competitive analysis was not only recognized by this Court in *El Paso,* it is substantiated by the competitive history of the California market. Since the illegal acquisition of Pacific Northwest by El Paso two competitors have entered the market with reserves located at points much further removed from the California market than the Wyoming basins. Transwestern was not even engaged in the natural gas transmission industry before it constructed its California project.

The industrial experience, financial ability, geographic location and competitive history of CIG and New Company teaches that they are both potential competitors for the incremental demand of the California market. As in *Penn-Olin,*

> This array of probability certainly reaches the *prima facie* stage . . . to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. *United States* v. *Penn-Olin Chemical Corp., supra,* at p. 175.

The natural gas industry is certainly highly concentrated. It is oligopolistic if not monopolistic. The need to preserve competition in the industry is directly related to the small number of competitors and their vast economic power. CIG and New Company, together, may be a stronger California competitor than either company alone. The anticompetitive effects of the acquisition, however, cannot be condoned on the basis that the economic power of the existing California competitors requires the combina-

tion of potential California competitors to make a stronger potential California competitor. This Court has already rejected such an argument when in *United States* v. *Aluminum Company of America*, it stated:

> If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. *United States* v. *Aluminum Company of America, supra,* at p. 279.

In *Penn-Olin* this Court held that if it was reasonably probable that one of two potential competitors would have entered the market while the other remained a significant potential competitor, the entry of both competitors by means of a joint venture foreclosing potential competition violates Section 7 of the Clayton Act, even though the joint venture may have been a stronger competitor than the entry of any single competitor. In *Penn-Olin* there was no permanent corporate acquisition increasing economic concentration. In *Penn-Olin* the new market entry of Penn-Olin was certain. In *Penn-Olin* the joint venture actually increased competition. Here it is only certain that the acquisition of New Company by CIG will produce greater concentration in an already highly concentrated industry and that potential competition between CIG and New Company for the California market will be eliminated. Under the decisions of this Court such certainty constitutes a violation of Section 7 of the Clayton Act. *United States* v. *Penn-Olin Chemical Co., supra; United States* v. *Von's Grocery Co., supra;* and *United States* v. *Aluminum Company of America, supra.*

2. *The acquisition of New Company by CIG "may be substantially to lessen competition" in the acquisition of gas reserves in Wyoming in violation of Section 7 of the Clayton Act.* The lower court, despite Appellant's objection, made no findings of the effect of the acquisition of New Company by CIG on the acquisition of gas reserves in Wyoming. The line of commerce in this litigation obviously includes the acquisition and production of natural gas. (See Gov't's claim in *El Paso* on the acquisition of gas reserves in the San Juan Basin. The lower court apparently conceived that under *Cascade* it was only its duty to create the strongest possible competitor for the sale of natural gas in the California market regardless of the effect on competition in other markets and in other phases of the natural gas industry. In so doing, the lower court errored. This Court has previously made it clear that the primary objective of an (antitrust) decree to remedyl a Section 7 violation is to give "complete and efficacious effect to the prohibitions of the statute." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 327 (1961) This Court has further held that a corporate acquisition will violate Section 7 of the Clayton Act if that acquisition has the requisite anticompetitive effect in any section of the country, *United States* v. *Pabst Brewing Co., supra,* and that the procompetitive effect in one market cannot be used to justify the anticompetitive effects in another. *United States* v. *Philadelphia National Bank, supra.* Therefore, even assuming *arguendo* that the acquisition of New Company by CIG was procompetitive in terms of the sale of natural gas in California, the acquisition of New Company by CIG would violate Section 7 if such acquisition would foreclose competition in the acquisition of natural gas reserves in the Wyoming basins The overwhelming

probability if not the veritable certainty is that CIG's acquisition of New Company will foreclose competition for the acquisition of natural gas reserves in Wyoming.

The lower court recited that CIG presently takes 80% of its gas supply from the Anadarko Basin while New Company presently draws its gas supply from Canada, the San Juan Basin and the Big Piney Field in Wyoming. The lower court accurately recited that at the present time there is no field from which both companies take natural gas and that the New Company's supply in the Big Piney Field in Wyoming is 75 miles distant from CIG's supply in the Deseret Springs Field in Wyoming. The recitation of these facts, however, does not fully or accurately portray the competitive situation with regard to the acquisition of Wyoming gas reserves.

The natural gas transmission systems of both companies are now located in the Green River Basin. Both companies now draw natural gas from the Green River Basin — New Company from the Big Piney Field and CIG from the Deseret Springs Field. CIG and New Company are two of the three natural gas transmission companies now taking gas from the Green River Basin and are the two largest companies drawing gas from this basin. Both companies must acquire new reserves in the immediate future to serve the incremental demands of their existing markets, and, it is clear, that both companies will have to look to the tremnedous potential of the Wyoming basins to acquire such reserves.

CIG testified that the present competitive situation in the Anadarko Basin makes it unlikely that it will be able to substantially increase its reserves in that area. CIG, since 1966, has been acquiring gas reserves in the Green

River Basin in Wyoming and in its Annual Report of 1966 it told its stockholders that Wyoming was the bright spot for the acquisition of future reserves.

The development and exploration that has taken place in the Green River and Wind River Basins has primarily been around the edge of such basins in the structurally high areas and the deeper portions of such basins remain relatively untested. (Tr.-2670.) It is these deep portions that will "be the dominate target of future exploration." (Haun, Summary of Testimony, at p. 1.) The lack of exploration makes it impossible to accurately estimate the reserve potential of such basins, but CIG repeatedly testified that the Green River and Wind River Basins in which CIG had acquired reserves at the time of the Rock Springs project had "tremendous potential." (Tr.-3006.)

In summary, CIG and New Company's natural gas transmission systems are presently both located in the Green River Basin of Wyoming. CIG and New Company presently draw gas from fields only 75 miles part in the Green River Basin and CIG and New Company's systems have ready access to the undeveloped reserves of the Green River and Wind River Basins. CIG and New Company are the two largest and two of the three natural gas transmission companies now drawing gas from the Green River Basin. CIG and New Company both must immediately develop additional reserves to serve the near term incremental demand of their respective markets and certainly would have to devlop such reserves in order to mount a California project. Neither the San Juan Basin nor the Anadarko Basin from which New Company and CIG, respectfully, now draw their major source of supply offer the opportunity for the development of substantial additional

reserves and both companies must look to Wyoming, which is an area of tremendous potential, to develop the future reserves that their systems require. This summary of undisputed facts taken from CIG's own testimony can only lead to the conclusion under settled authority that the acquisition of New Company by CIG "may be to substantially lessen competition" in the acquisition of gas reserves in Wyoming. *United States* v. *Von's Grocery Co., supra; United States* v. *Pabst Brewing Co., supra; United States* v. *Aluminum Company of America, supra;* and *United States* v. *Philadelphia National Bank, supra.*

3. *The acquisition of New Company by CIG "may substantially lessen competition" in the sale of natural gas in Utah and Western Colorado in violation of Section 7 of the Clayton Act.* New Company and CIG presently share three common customers — Plateau Natural Gas Company, Western Slope Company and Mountain Fuel Supply Company. CIG furnishes gas to two of the customers, Plateau Natural Gas Company and Western Slope Company, on the eastern side of the Continental Divide, while New Company furnishes them gas on the western side of the Divide. Mountain Fuel Supply presently purchases gas from both New Company and CIG on the same line in the Green River Basin although New Company is presently a substantial supplier of Mountain Fuel Supply, CIG only supplies Mountain Fuel a relatively small quantity of gas on a short term basis. Mountain Fuel, however, historically has purchased a large quantity of its natural gas requirements from other natural gas companies. (*United States* v. *El Paso Natural Gas Co.,* Oct. term, 1962, Case No. 94, Gov't. Br., App. B, GX-15.) Mountain Fuel, furthermore, presently draws a substantial quantity of its natural gas

requirements from the Green River Basin. The acquisition of New Company by CIG will foreclose the only available competition for Mountain Fuel's needs in the future. While such foreclosure may seem relatively insignificant in terms of other anticompetitive consequences of CIG's acquisition of New Company, it is of substantial concern to the Appellant and under settled authority would independently constitute the requisite anticompetitive effect that would condemn CIG's acquisition of New Company. *United States* v. *Von's Grocery Co., supra.*

4. *The extension of CIG's monopoly from Eastern Colorado to the Pacific Notrhwest by acquisition and the enhancement of CIG's monopoly power in both markets constitutes a violation of Section 7 of the Clayton Act.* CIG's acquisition of New Company extends CIG's monopoly from Eastern Colorado to the Pacific Northwest. The acquisition will further enhance the monopoly power of both companies in their respective markets. The undisputed facts demonstrate that the natural gas market of the Pacific Northwest is booming and that its rapid growth rate will continue in the years ahead. By proximity, management, financial resources, the availability of gas reserves and the ability to develop them, CIG qualifies as a potential competitor to serve the incremental demand of the Pacific Northwest. Appellant concedes that the record does not disclose whether a new project to serve the incremental demand of the Pacific Northwest with Wyoming-Rocky Mountain gas is feasible now or in the immediate future. Certainly the fact that the Pacific Northwest Pipeline Corporation initially served the demand of that region with reserves from these areas and the San Juan Basin indicates that such a project is at least possible if

not probable. Whatever the probabilities of CIG's future competition in the Pacific Northwest, there is no question that the foreclosure of CIG's potential competition, whatever the degree of that competition, enhances the monopoly power of New Company in that region. The monopoly power of the CIG-New Company combination is further enhanced by CIG's acquisition of a major supplier, by the foreclosure of competition for the Wyoming reserves and by the foreclosure of any future competition from New Company for CIG's major markets. Finally, the monopoly power of this combination is demonstrably enhanced by the shear increase of economic power as a result of this acquisition.

This Court has repeatedly noted that the primary objective of Section 7 was to prevent economic concentration in the American economy. Applying this principle this Court has held that a merger of two companies having 7.5% of the combined Los Angeles retail grocery market violates Section 7 of the Clayton Act when there was a trend toward concentration in that market. *United States* v. *Von's Grocery Co., supra.* In *Von's Grocery* this Court determined on these facts that the requisite probably anticompetitive effect existed without attempting to analyze the actual competitive impact of the merger on the market. The Court has further held that in a highly concentrated oligopolistic market Alcoa's acquisition of a competitor having 1.3% of the aluminum conductor market violated Section 7. The Court said where concentration is already great "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Aluminum Company of America, supra,* at p. 279.

If a slight increase in economic concentration as a result of merger between direct competitors in markets having a trend toward concentration, or in a highly concentrated market results in the probable anticompetitive effect condemned by Section 7, the Appellant submits that any significant extension or enhancement of monopoly power through acquisition by a firm having a monopoly in an important line of commerce in a major section of the country *a fortiori* constitutes a violation of Section 7.

This Court has held that "all mergers are within the reach of § 7 and all must be tested by the same standard, whether they are horizontal, vertical, conglomerate or other." *FTC* v. *Procter & Gamble Co., supra,* at p. 577. The rationale of *Von's Grocery* and *Aluminum Company of America* is, therefore, applicable to all mergers, not just merely mergers between direct competitors. This Court has used concentration as the economic criterion to predict probable anticompetitive consequences on the experience that economic concentration produces the risk that large ostensible competitors rather than compete will follow parallel policies of mutual advantage and that economic concentration and the associated accumulation of economic power makes market entry more difficult. In short, significant economic concentration is condemned because it tends to produce the economic evils of monopoly. If significant economic concentration results in the requisite anticompetitive effect because it tends to produce monopolistic business practices, then a merger that strengthens and extends monopoly power must produce the probable anticompetitive effect condemned by Section 7.

5. *This Court having established that the acquisition of Pacific Northwest by El Paso violated Section 7 of the*

Clayton Act, the acquisition of New Company by CIG is improper if there is any substantial likelihood that the tendency toward monopoly has not been eliminated, and alternative means of divestiture remain. This Court has held that a divestiture decree to remedy a Section 7 violation is improper even though the implementation of the decree does not independently violate Section 7 of the Clayton Act if it appears "that the decree entered leaves a substantial likelihood that the tendency toward monopoly of the acquisition condemned by Section 7 has not been satisfactorily eliminated." *United States v. E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 331-32 (1961). In short, a divestiture decree issued in a Section 7 litigation is governed by a stricter anticompetitive standard than Section 7 of the Clayton Act.

In *du Pont* the Supreme Court spoke in the context of a divestiture decree that solely divested voting rights to remedy an illegal stock acquisition. The standard of *du Pont* cited above, however, is applicable to the enforcement of all divestiture decrees formulated to remedy a Section 7 violation and the Government has advocated in this Court that that standard be used to assess the propriety of a Section 7 divestiture decree providing for the sale of an illegally acquired company to a third party. *United States v. Aluminum Comapny of America,* Oct. Term, 1967, No. 277, Government Jurisdictional Statement (hereinafter referred to as "Gov't Statement").

In *Alcoa* the Government claimed that the district court had applied an improper standard in determining the anticompetitive effect of the divestiture of Rome to Okonite. The Government contended that under *du Pont*

it was not required to show that the divestiture to Okonite violated Section 7. The Government's primary argument was that under *du Pont* the court was called upon to determine whether the divestiture decree providing for the sale of Rome to Okonite left a substantial likelihood that competition in the industry remained significantly less than it would have but for the original violation, and if so, whether there were alternative means of divestiture. (Gov't St. at p. 10) Utah contends that the same standard advocated by the Government as the appropriate test to determine the propriety of the divestiture of Rome to Okonite in *Alcoa* should be applied in determining the propriety of CIG's acquisition of New Company. Under such a test, it is clear that CIG's acquisition of New Company does not eliminate the tendency toward monopoly condemned in *El Paso*.

Although the district court with the support of the Government and all other intervenors who assessed the applicants properly found that other applicants were qualified to acquire New Company and to make New Company a competitor for the California market, the district court did not apply this *du Pont* test in determining whether CIG should acquire New Company. The Government, contrary to its position in *Alcoa* did not suggest that the lower court apply this test, Utah did. No other applicant is presently engaged in the natural gas transmission industry and no significant anticompetitive problems will be presented by any other applicant's acquisition of New Company. Appellant submits, therefore, that the district court, under *du Pont*, should have selected another applicant.

CONCLUSION

The acquisition of New Company by CIG nullifies the complete and efficacious enforcement of Section 7 of the Clayton Act. The questions presented are substantial and are entitled plenary consideration.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
CIVIL ACTION No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS
COMPANY and PACIFIC
NORTHWEST PIPELINE
CORPORATION,
Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND OPINION

Dated June 21, 1968

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

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PRELIMINARY STATEMENT

The following is a brief summary of the facts and background which lead to the present phase of this litigation. A more detailed account is found in three decisions of the Supreme Court:

California v. *Federal Power Commission*, 369 U. S. 482.

United States v. *El Paso Natural Gas Co.*, et al., 376 U. S. 651.

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, et al., 386 U. S. 129. (Referred to as Cascade)

Prior to the year, 1954, El Paso Natural Gas Company (El Paso) was engaged in the business of transporting natural gas interstate to the California border for sale to distributors who distributed the gas to users in southern California. At that time, El Paso was the sole out-of-state supplier to the California market.

In 1954, Pacific Northwest (PNW) received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin in New Mexico to the State of Washington to supply gas to the then unserved Pacific Northwest area. The pipeline was completed and service was begun in 1956.

PNW had obtained authorization to receive large quantities of Canadian gas and, in addition, had acquired Rocky Mountain gas reservoirs along its route and gas reserves in the San Juan Basin. In 1954, PNW tried to enter the rapidly expanding California market by transportation of Canadian gas to Pacific Gas & Electric Co. (PG & E) in northern California, and the effort was renewed in 1955. In 1956, PNW negotiated with Southern

California Edison Co. (Edison) to supply it with natural gas.

Although PNW had no pipeline into California and its efforts to enter the California market were unsuccessful, these efforts were a substantial competitive factor in the California market and led to a price reduction and other concessions to the ultimate benefit of Edison.

El Paso had been interested in acquiring PNW since 1954. The first offer from El Paso was in December 1955, an offer PNW rejected. Negotiations were resumed by El Paso in the summer of 1956, while PNW was still trying to obtain entry to the California market.

In November of 1956, El Paso offered to exchange El Paso shares for PNW shares. This offer was accepted by PNW directors and by May 1957, El Paso had acquired 99.8 percent of PNW's outstanding stock.

In July 1957, the Department of Justice filed suit against El Paso in the U. S. District Court for the District of Utah charging that the stock acquisition violated Section 7 of the Clayton Act.

In August 1957, El Paso applied to the Federal Power Commission for permission to acquire the assets of PNW, and on December 23, 1959, the commission approved and the merger of PNW with El Paso was effected on December 31, 1959. California, an intervenor in the proceedings, obtained a review by the Court of Appeals, which affirmed the Commission (111 U. S. App. D. C. 226, 296 F.2d 348). The Supreme Court granted certiorari and set aside the Commission's approval, holding that it should not have acted until the District

Court had passed on the Clayton Act issues. *California v. Federal Power Commission,* 369 U. S. 482 (supra).

Meanwhile, (in October 1960) the United States amended its Complaint in the District Court so as to include the asset acquisition by merger in the charge of violation of the Clayton Act. Upon trial of this action, the District Court found for El Paso; the U. S. appealed; the Supreme Court, on review of the record which was composed largely of undisputed evidence, concluded that the effect of the acquistion "may be substantially to lessen competition" within the meaning of Section 7 of the Clayton Act, reversed the judgment and remanded with directions to the District Court "to order divestiture without delay." *United States* v. *El Paso Natural Gas Company,* et al., 376 U. S., p. 651 (supra).

Upon remand to the District Court, motions to intervene by the State of California, Southern California Edison Company, (Edison) and Cascade Natural Gas Company (Cascade Company) were denied, and the District Court entered a decree of divestiture which had been agreed upon by the Department of Justice and El Paso.

California, Edison, and Cascade Company appealed from the denial of their motions to intervene. The Supreme Court in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company,* et al., 386 U. S. 129 (supra) reversed the District Court and remanded with directions to allow each appellant to intervene as a matter of right and that the proceedings be reopened to give California, Edison, and Cascade Company an opportunity to be heard as intervenors.

The Court also held that the agreed decree, entered by the District Court, was not in accord with the Supreme Court's mandate in 376 U. S. 651 (*supra*) which required that PNW, or a new company, be at once restored to a position where it could compete with El Paso in the California market; ordered the District Court to vacate the orders of divestiture previously entered; "have de novo hearings on the type of divestiture" the Court envisioned and made plain in its opinion in 376 U. S. 651; directed "- - - there be a divestiture without delay - - -"; suggested guidelines that should be followed in ordering the divestiture and ordered that a different District Judge be assigned to hear the case.

PROCEEDINGS SINCE CASCADE

(For further detail see Appendix)

On April 18, 1967, the undersigned was assigned to the District of Utah to conduct the further proceedings required by Cascade.

After a conference with counsel on June 9, 1967, the Court granted 26 Motions to Intervene; continued the Federal Power Commission as amicus curiae; ordered El Paso to file a plan for divestiture by August 4, 1967; ordered those desiring to acquire the divested properties (applicants for acquisition) to file proposals by August 25, 1967; and permitted intervenors until September 18, 1967, to file comments on the proposals made and to make proposals of their own.

On October 3, 1967, a pre-hearing conference was had; the "de novo" hearings were commenced on October 16, 1967, in Ogden, Utah; were recessed on Novem-

ber 15, 1967; were resumed on January 8, 1968, in Denver, Colorado, and the taking of evidence was concluded March 21, 1968.

Briefs were filed — the last one on May 25, 1968, and oral argument was had on June 3, 1968.

In addition to the plaintiff and defendant, the Federal Power Commission as amicus curiae, 22 intervenors and 9 applicants for acquisition participated in all or a part of the hearings.

The names of the participating intervenors and applicants for acquisition are set forth in the appendix.

SUMMARY OF PLANS PROPOSED

In accordance with the procedure prescribed by this Court, El Paso filed a divestiture plan (El Paso Exhibit 1) which is here summarized.

Thereafter, the applicants for acquisition filed their proposed plans, followed by the comments of intervenors, some of which made specific suggestions concerning the plans proposed. Edison suggested two alternate plans for divestiture.

SUMMARY OF EL PASO PLAN

Transfer of Assets to New Company

El Paso proposes to transfer to a corporate entity referred to herein as "New Company," all of the operating property acquired from Pacific Northwest and additions thereto, $5,000,000 for working capital, designated gas reserves, and certain other assets in exchange for all of New Company's common stock and New Com-

pany's assumption of approximtaely $170,000,00 face amount of El Paso's bond and debenture indebtedness, plus the cost of transferring this debt from El Paso to New Company (roll over cost) of an increase in the interest rate of one-eighth of one percent.

El Paso would sell up to 20 percent of New Company's common stock to the successful applicant selected by the Court, and the balance of eighty percent or more would be deposited by El Paso in a voting trust to be administered under Court supervision by a trustee who would be wholly independent of El Paso and who may, with the approval of the Court, be the purchaser.

Non-voting certificates of participation in the voting trust would be issued and distributed by El Paso to its common shareholders. These participation certificates would be exchangeable for the underlying shares of New Company common stock under Court-approved provisions which would effectively preclude El Paso, its officers, directors, and common shareholders from acquiring any shares of New Company common stock.

The voting trust would terminate at the end of ten years, at which time any remaining New Company shares not exchanged would be sold by the trustee for the benefit of the remaining certificate holders.

The limitation of the sale of New Company stock to a maximum of 20 percent and placing the balance in a voting trust for the benefit of El Paso stockholders is designed to qualify the divestiture as a "D" type reorganization under Section 368 and a spin-off under Section 355 of the Internal Revenue Code, which under Section 361 of the Code would result in no taxable income

to El Paso on the transfer of the assets to New Company. A sale of more than 20 percent of the New Company stock would not comply with the requirements of Section 368(c) of the Code, hence the 20 percent limitation.

The voting trust is proposed as the means to comply with the requirement of Cascade that New Company be insulated from domination by El Paso or its stockholders.

Sale Price of New Company Stock

The sale of up to 20 percent of New Company stock would be at a negotiated price. El Paso proposes that the Court select those applicants which it finds qualified and allow El Paso to negotiate separately with each of them and present to the Court the agreements negotiated. The Court would select the successful applicant, presumably the one paying the highest price.

Divestiture

The successful applicant would then acquire the management of New Company, and El Paso and New Company would file applications with Federal Power Commission for authority to transfer the divested properties to New Company for operation.

Westcoast and Northwest Production Stock

El Paso proposes to sell this stock to persons satisfactory to the Court as soon as practicable after the Court approves the plan of divestiture.

Reimbursement for Use of PNW's Tax Losses

El Paso proposes no reimbursement to New Company for its use of PNW's tax losses. El Paso claims that the tax losses were used to maintain lower rates in

the northwest division than otherwise would have been possible and thereby the benefits of the utilization of the tax losses were largely flowed through to the gas consumers in the northwest.

Inter-Company Contracts

El Paso proposes to reinstate the Sumas Exchange Agreement which provides for the purchase by El Paso of 100,000 MCF per day from New Company's reserves in the San Juan Basin and to reinstate the CIG contract, whereby New Company will honor an obligation of PNW to transport and deliver from the San Juan Basin to CIG at Rock Springs, Wyoming, a certain amount of gas.

El Paso also proposes negotiation of a mutual gas gathering agreement in the San Juan Basin on a cost-of-service basis.

(These contracts and their disposition are discussed in detail later in this opinion.)

GAS RESERVES

El Paso proposes to divest to New Company the following gas reserves:

1. All reserves attributable to all gas supply sources now held by El Paso in the San Juan Basin and elsewhere as a result of the acquisition of PNW stock, both in the form of leaseholds and contracts for the purchase of gas;
2. All contracts negotiated since January 1, 1957, for Canadian gas and for all other gas supplies located north of Ignacio, Colorado;
3. A division of the gas reserves in the San Juan Basin.

SUMMARY OF OTHER PLANS

During the course of the hearings, some plans were modified from the original proposals; but the final briefs of the applicants contain a summary of the plans as finally submitted. However, all applicants for acquisition stated that they desire to be considered as applicants under any plan which the Court might devise. With this qualification, the Court summarizes the more pertinent parts of the plans submitted for the Court's consideration.

SUMMARY OF ASPEN PLAN

Aspen accepts El Paso's proposal to convey the assets to be divested to New Company, with New Company assuming the bond and debenture indebtedness as proposed by El Paso. El Paso would receive all of the stock of New Company, except an amount to be determined by the Court which would go to the founders of Aspen as founders' shares. Aspen suggests three percent. The remainder of the New Company stock would be deposited by El Paso in a voting trust as proposed, but the trust would be limited to five years. Aspen's plan eliminates the sale of any New Company stock by El Paso.

At an appropriate time, Aspen would merge with New Company.

The West Coast and Northwest Production stock would be divested to New Company, sold by it, and the net proceeds after payment of taxes would be used as working capital.

Aspen desires no reimbursement for El Paso's utilization of PNW's tax losses.

Aspen accepts El Paso's proposals regarding the inter-company contracts.

Aspen accepts El Paso's division of the gas reserves as fair and equitable.

SUMMARY OF COLONIAL'S PLAN

Colonial accepts El Paso's proposal with certain modifications, and is prepared to purchase up to 20 per-cent of the New Company stock at a negotiated or Court-determined price.

West Coast stock should be transferred to New Company at book value and sold by New Company.

As to inter-company contracts, Colonial suggests the reinstatement of the Sumas Exchange Agreement with an option to cancel on 18 months' notice; reinstatement of Colorado Interstate Contract; non-reinstatement of Kingsgate Agreement and reinstatement of the San Juan Gathering Agreement at the old price subject to negotiation under the requirements of the natural gas act.

Colonial believes that the total gas reserves to be divested have been overestimated, and that the New Company-San Juan reserves should be supplemented; or, there should be an exchange of New Company Basin-Dakota reserves for additional Mesaverde reserves. El Paso should convey to New Company the exploratory acreage acquired by El Paso since the stock acquisition in basins located in the northwest division area.

SUMMARY OF COLORADO INTERSTATE PLAN

CIG accepts El Paso's proposals with substantial modifications.

CIG proposes to furnish its own working capital.

CIG would reimburse El Paso for the divested assets at fair market value to be determined by negotiation with El Paso.

CIG would accept El Paso's proposal that the assets be divested to New Company; New Company assume approximately $170,000,000 of the debt and debenture indebtedness, plus the roll over cost. For its equity, El Paso would receive preferred stock of New Company convertible into CIG common. CIG would receive 100 percent of the New Company common stock in exchange for $5,000,000 in cash plus sufficient stock of CIG to satisfy the conversion requirements of New Company preferred stock.

Appropriate restrictions would be included in the divestiture decree to insulate New Company and CIG from domination or control by El Paso, its directors, officers, or major stockholders.

CIG proposes the acceptance of El Paso's division of the gas reserves, subject to modification of the Sumas Exchange Agreement, either by reducing deliveries to 50,000 MCF per day, commencing in 1971 and terminating after 1973, or an option by CIG to cancel the agreement on reasonable notice.

CIG accepts El Paso's proposal with reference to the West Coast and Northwest Production stock, the tax

loss carry over, and the inter-company contracts, except for the proposed modification of the Sumas Exchange Agreement.

SUMMARY OF CONTINENTAL-PACIFIC (COPACO) PLAN

Copaco accepts the El Paso plan with modifications.

Copaco would merge into New Company and Copaco stockholders would, as a result of the merger, receive common stock of New Company on the basis of one share for each $12.50 of capital provided to New Company by Copaco. Thus, Copaco would obtain 480,000 shares of New Company stock (9.16 percent); New Company by the merger would receive $6,000,000 in cash, and El Paso would receive 90.84 percent of the New Company stock. El Paso would have the right, subject to Court approval, to sell approximately 10 percent of the New Company stock or offer to exchange that much with El Paso shareholders for El Paso common. The remaining New Company stock (80 percent or more) would be placed in a voting trust as proposed by El Paso.

Copaco does not propose divestment of West Coast and Northwest Production stock to New Company and does not propose a reimbursement by El Paso for the use of PNW's tax losses; but should such a reimbursement be made, it should be used as a reserve to lower the book value of the property to be divested by El Paso.

SUMMARY OF GREAT LAKES PLAN

Great Lakes adopts the El Paso plan including the non-divestment of West Coast and Northwest production stock and no reimbursement for tax loss carry over. However, Great Lakes suggests that the voting trust should be for a period of 10 - 15 years; that there should be an independent trustee and that the trustee should not be ocntrolled either by El Paso or New Company.

SUMMARY OF PACIFIC WESTERN'S PLAN

Pacific Western proposes the assumption of a proportionate part of El Paso's bond and debenture indebtedness and a cash purchase of the equity. The purchase price would be based on book value of the utility assets and West Coast stock; or, if the Court so decides, the fair market value. The funds for the purchase would be obtained from a public sale of Pacific Western stock.

As an alternative plan, Pacific Western proposes to acquire the equity in the divested assets by a stock exchange as follows:

1. Pacific Western would exchange its stock with El Paso stockholders in return for all of their El Paso stock.
2. El Paso would transfer the assets and related liabilities to New Company in return for 100 percent of New Company stock.
3. El Paso would transfer the stock of New Company to Pacific Western, solely in exchange for the shares of El Paso acquired by Pacific Western.
4. Pacific Western would merge with New Company.

Pacific Western believes such an exchange is a tax-free transaction.

West Coast stock should be sold by El Paso and the net profit after taxes should be credited to New Company.

Northwest Production stock to be retained by El Paso.

El Paso may retain Pacific Northwest Realty stock, Phillips Pacific stock, and the Prairie Pipeline, Prairie Transmission, and Specialty Products stock.

El Paso should reimburse New Company to the extent of $4,972,000 for El Paso's use of the tax loss carry over.

As to inter-company contracts, Pacific Western suggests reinstatement of the CIG contract and Sumas Exchange Agreement, but the latter with an option to cancel. The San Juan Gathering Agreement should be reinstated at $.04½ per MCF with any price differential determined by the Federal Power Commission to be retroactive.

The Kingsgate Exchange Agreement should be reinstated.

Gas Reserves

Pacific Western takes the position that El Paso's estimate of the gas reserves to be divested of 9.2 TCF is overestimated and that El Paso should guarantee to New Company, total reserves in the amount of 9.2 TCF, and that New Company should have an option to cancel the Sumas Exchange Agreement.

SUMMARY OF PARADOX PLAN

Paradox proposes a cash purchase of El Paso's equity. Paradox would assume $170,000,000 of El Paso's indebtedness and pay cash for the equity at book value ($61,000,000) plus an amount equal to the book value of the stock of West Coast Transmission; or, Paradox would pay cash up to $73,000,000 plus an amount equal to the book value of the stock of West Coast.

The funds would be raised through an underwriting and sale of Paradox stock to the public.

SUMMARY OF ROSENBLATT-HUSKY PLAN

Accepts the El Paso plan, with modifications.

West Coast stock should be divested to New Company for working capital, "at a value equal to the net realizable proceeds from the sale of those shares."

There should be some reimbursement for El Paso's use of PNW tax losses.

There should be three voting trustees to be designated by the Board of Directors or the Executive Committe of Rosenblatt-Husky.

SUMMARY OF WESTERN STATES' PLAN

Accepts the El Paso plan and would propose to purchase 20 percent of the common stock of New Company (less founders' shares). The funds for the purchase would be obtained through a nationwide public offering of Western States' stock.

In the alternative, Western States would acquire all of the common stock of New Company. Up to 20 percent

of the stock would be purchased for cash derived from the proceeds of a public offering of Western States' stock. The balance of 80 percent or more would be acquired by an exchange of El Paso stock for the New Company stock. The El Paso stock would be acquired by an exchange of Western States' stock for El Paso stock, the offer of exchange being made to El Paso stockholders.

Western States proposes that El Paso pledge the West Coast stock as security for an open line of credit which could be drawn upon by New Company for interim expenses. At the time of closing, this stock would be released from the pledge and sold as directed by the Court, with El Paso paying off the borrowings. Also, El Paso should stand Western States' interim expenses until the actual take-over.

With these provisions, El Paso should retain the West Coast stock and also the stock of the Northwest Production Company.

Western States does not request any reimbursement for the use of PNW tax losses.

Sumas Exchange Agreement should be reinstated with option to terminate on reasonable notice.

SUMMARY OF PLANS PROPOSED BY EDISON

In its original comments, Southern California Edison Company proposed two plans. The first proposed that the Court designate a specific purchaser from among the applicants, and that all of the assets to be divested be transferred to the successful applicant's corporation in exchange for its bonds and debentures in an amount to

be fixed by the Court and a specified percentage of the common stock of the acquiring corporation. The bonds and debentures received by El Paso would be exchanged by it for retirement of its own bonds and debentures in a manner similar to what El Paso proposes. The percentage of stock to be retained by the successful applicant should fairly reflect the effort expended, the expense incurred, and the risk taken.

The second plan is a slight variation of the El Paso plan. It would transfer the assets to New Company in exchange for New Company's common stock and an assumption of El Paso's bond and debenture indebtedness in the amount of $150,000,000 instead of $170,000,000 as proposed by El Paso. All of the stock of New Company would be deposited with a trustee. As soon as possible thereafter, the trustee would make a public offering through underwriter of 80 percent of the stock held by it, and as soon as the price for the 80 percent is established, the trustee will then sell the remaining 20 percent of the stock to the successful applicant at the net amount per share El Paso will realize from the public sale.

In its final brief, El Paso suggests that its alternate plan be modified to allow El Paso to dispose of the New Company stock as it sees fit, so long as it disposes of all the stock within a period of one year from the date of divestiture.

OTHER SUGGESTIONS OF INTERVENORS

The intervenors have made many and varied suggestions for modifications in the El Paso plan and suggestions for the Court's consideration in devising a

plan for divestiture. Time does not permit nor would any good purpose be served by a discussion of them. They have been considered by the Court and, together with the evidence, constitute the basis for the Court's determination.

PROPERTY TO BE DIVESTED

El Paso proposes to divest to New Company the following:

Physical Assets

The property plant and equipment described in El Paso Exhibit 18 and 22 together with any additions, modifications, or replacements thereof subsequent to August 4, 1967.

Gas Sales Agreement

All gas sales contracts with any customer connected to any of the facilities to be divested to New Company existing at the effective date of the divestment.

Investments

(See Appendix for further detail.)

1. 49 percent of the capital stock of Phillips Pacific Chemical Co., which owns a fertilizer plant near Hedges, Washington;
2. All of the capital stock of Pacific Northwest Realty Corporation which owns an office building in Salt Lake City, Utah;
3. Inactive subsidiaries acquired from Pacific Northwest as a result of the merger:
   Prairie Pipeline Ltd.
   Prairie Transmission Lines Ltd.
   Specialty Gas Products

The total investment in these companies is $61,000.

4. Miscellaneous club memberships representing an investment of $7,000.

These proposals have met with no objection. The Court finds that these physical assets and gas sales agreements are essential to the service of the northwest division and should be divested to New Company. The investments above described were acquired as a result of the merger, will in total contribute to the welfare of New Company, and should be divested to it.

Gas Reserves

El Paso, in its plan of divestiture, proposes to divest to New Company, all reserves now held by El Paso in the San Juan Basin and elsewhere as a result of the acquisition of Pacific Northwest stock, all contracts negotiated since January 1, 1957, for Canadian gas, and all other gas supplies located north of the San Juan Basin (Ignacio, Colorado), and a portion of the San Juan reserves acquired since the acquisition of PNW by El Paso.

After deducting the gas produced since January 1, 1957, to serve the northwest division markets, the gas reserves to be divested to New Company as of January 1, 1967, are estimated by El Paso to be approximately 9.2 TCF.

At Tabs 5 and 6 of El Paso's Exhibit 1, is El Paso's summary of the dedicated reserves to be divested and a comparison of remaining reserves, percentages, and reserve life indexes for divested company and El Paso. Tabs 5 and 6 are set forth on the following page:

TAB 5

SUMMARY OF DEDICATED RESERVES TO BE DIVESTED

(Gas Volumes in M³cf at 14.73 psia Preasure Base and 60° F.)

Source *Field and Reservoir*	*1-1-67 Pipeline Gas Reserves*
CANADIAN	
West Coast Transmission-Sumas	2,667.9
West Coast Transmission-Kingsgate	765.0
	3,432.9
ROCKY MOUNTAIN AREA	
Big Piney Fields	
Big Piney (Almy-Mesaverde)	138.9
Big Piney (Frontier-Muddy)	2,153.2
	2,292.1
Piceance (Douglas Creek — Wasatch "A" & "G")	196.2
Miscellaneous Fields	128.6
	2,616.9
SAN JUAN AREA	
Basin Dakota Field	1,053.7
Basin Pictured Cliffs Field	396.2
Blanco Mesaverde Field	1,752.1
Miscellaneous Fields	4.6
	3,206.6
TOTAL —	9,256.4

TAB 6

COMPARISON OF REMAINING RESERVES, PERCENTAGES AND RESERVE LIFE INDEXES FOR DIVESTED COMPANY AND EL PASO

(Gas Volumes at 14.73 psia and 60° F.)

	PNW or Divested Company	*EPNG*	*Total*
January 1, 1957			
San Juan Reserves, bcf	2,591	9,539	12,130
Per Cent	21.4	78.6	100.0
Total System Reserves, bcf	6,054	27,281	33,335
Per Cent	18.2	81.8	100.0
1956 Production, bcf	....	856	
Reserve Life Index, Years	....	31.9	
January 1, 1967			
San Juan Reserves, bcf	3,207	11,509	14,716
Per Cent	21.8	78.2	100.0
Total System Reserves, bcf	9,256	30,165	39,421
Per Cent	23.5	76.5	100.0
1966 Requirement, bcf	343	1,268	
Reserve Life Index, Years	27.0	23.8	
Deliverability Life, Years	12	10	

A detailed description of the reserve acreage and gas supply data is set forth in El Paso Exhibits 23 and 24.

The primary controversy regarding the division of the gas reserves relates to the validity of El Paso's estimate of the reserves proposed to be divested to New Company in the Big Piney fields (principally Frontier-

Muddy) and in the Blanco-Mesaverde, Basin Pictured Cliffs, and Basin Dakota fields of the San Juan Basin. It is to this controversy that the Court's Findings of Fact are first directed.

The reserves in the Big Piney field and the San Juan Basin consists of both developed and undeveloped reserves, and there is no way of being absolutely certain of how much gas can be produced and recovered from these various fields in advance of the time that the gas is actually produced in its entirety. However, the gas industry recognizes certain methods and techniques by which estimates are made which are used by industry and regulatory commissions such as the Federal Power Commission.

Two basic methods are recognized. One is the performance method, often referred to as pressure performance or the pressure decline method. In order to use the performance method, it is necessary to have pressure data and cumulative gas production records over a period of time from a substantial number of wells. Having this information, reservoir engineers can make an estimate of the recoverable gas in a particular gas reservoir.

The other method is known as the volumetric or pore volume method. This method is designed to calculate the porous space within a gas reservoir which contains recoverable gas. By the drilling of wells, analysis of the cores, use of electric logs and other techniques, the thickness, porosity, water content, gas pressure, temperature, and production limits of the formation are determined and with this information and by the use of recognized techniques, the amount of recoverable reserves is computed.

The volumetric method of estimating gas reserves is used when there is not sufficient performance data to justify the use of the performance method, but there is a sharp difference of opinion among the experts as to the number of years of performance data required to justify the use of the performance method in preference to the volumetric method.

In this case, the reserve experts who testified used one or both of these methods as well as their own refinements or modifications of the performance method. It is clear from the evidence that whatever the method or methods used by the experts who testified, the judgment of the expert plays an important part in the appraisal of the available data and in arriving at an estimate of recoverable gas reserves.

In addition to El Paso, Aspen, Colonial, Colorado Interstate, Pacific Western, Rosenblatt-Husky, and Western States made estimates of the gas reserves in the Frontier-Muddy in the Big Piney and the Mesaverde, Pictured Cliffs, and Basin Dakota fields in the San Juan Basin. The experts who made these estimates testified concerning them and the methods by which they arrived at their estimates.

The estimates of the various experts are at variance not only with El Paso's estimate, but also with each other, and the Court can discern no thread of consistency by which the Court can reconcile these variations.

To illustrate the size and nature of the variations, there is set forth the reserve estimates of El Paso, Aspen, Colonial, Colorado Interstate, Pacific Western, Rosenblatt-Husky, and Western States in the San Juan Basin and the Frontier-Muddy of the Big Piney.

	E. P. Exh. 23	Aspen Exh. 6 Gruy	Colonial Exh. 24 Sipes, Bailey & Williamson	C.I.G. Exh. 10 Van Horn	Pacific Western, Exh. 21 Harlan	Rosenblatt-Husky Exh. 4 Tab 13	Western States, Exh. 14 Culver
MESA VERDE	1,752.1	1,162.4	1,544.1	1,664.5	1,246.8	1,400.0	1,777.6
PICTURED CLIFFS	396.2	311.9	344.9	396.2	170.4	396.0	496.9
BASIN DAKOTA	1,053.7	1,001.3	497.0	737.6	606.7	951.0	895.
FRONTIER-MUDDY	2,133.2	405.3	1,897.7	1,399.6	1,403.9	1,726.0	2,153.2
TOTAL DIVESTITURE	9,256.4	6,752.5	8,184.9	8,099.1	7,329.0	8,374.2	9,222.

To add to this disparity, Mr. Grandall, testifying on behalf of Paradox, stated that El Paso had underestimated rather than overestimated the Pictured Cliffs and Mesaverde reserves by 38 percent. This estimate was used by Paradox to substantiate is contention that at the time of the stock acquisition on January 1, 1957, PNW had 28.6 percent of the San Juan reserves rather than 21.4 percent asserted by El Paso.

The producing formations in the Frontier-Muddy and San Juan Basin are "tight" formations, and the percentage of gas recovery and the rate of recovery is considerably less than in more porous formations. These factors complicate the estimate of reserves and have resulted in overestimates of reserves computed by use of the volumetric method. For example, El Paso's estimates by the volumetric method of the reserves of the Mesaverde and Pictured Cliffs formation at the time of the stock acquisition were later reduced by 30 to 40 percent after sufficient performance data had been obtained to use the performance method of estimation.

The Court finds that El Paso reserve studies and the data upon which the studies are based was assembled over many years of operation and is the same data used by El Paso in estimating reserves in the ordinary course of its business and in proceedings before the Federal Power Commission. The data upon which the estimate was made and the methods of evaluation have been consistently applied by El Paso in estimating both the reserves to be divested and those to be retained. Nevertheless, the Court finds that with present methods of production, the reserves proposed to be divested in the Frontier-Muddy of the Big Piney and in the San

Juan Basin will not produce recoverable gas in the quantities estimated. The greater part of the deficiency is in the estimate of the Basin Dakota reserves and results from El Paso's use of the volumetric method. The Basin Dakota was developed in recent years and its performance data is accordingly limited. The use of the volumetirc method cannot be said to be unjustified; but if the Basin Dakota reserves proposed to be divested are overestimated, then also the Basin Dakota reserves retained by El Paso are overestimated in the same proportion, for the same data and the same methods were used in estimating both.

The principal variance in the reserve estimates in the Mesaverde and Pictured Cliffs fields relates to the undeveloped reserves; but the magnitude of the difference between most of the experts is not sufficient to affect the application of either of the Cascade guidelines relating to reserves.

Because of the lack of sufficient performance data in the Frontier-Muddy, El Paso used a combination of the performance and volumetric methods to make the reserve estimates, and it may be that these reserves are overestimated because of insufficient performance data. However, these reserves were obtained from PNW as a result of the merger. If El Paso's estimate is high, it means that the field has always contained less reserves than previously estimated; and to that extent, PNW had a smaller percentage of the total reserves of the two systems at the time of the merger. In other words, if the Frontier-Muddy reserves have been overestimated, it would reduce El Paso's estimate of the total reserves, but it would not change the percentage relationship be-

tween what El Paso acquired in the Big Piney by virtue of the merger and what it is divesting.

Although it is not possible to ascertain with accuracy the total recoverable gas in the reserves which El Paso proposes to divest to New Company, the Court can determine from the evidence whether or not El Paso's proposal meets the Cascade tests which are here repeated:

(a) The reserves granted new company must be no less in relation to present existing reserves than PNW had when it was independent; and,

(b) the new reserves developed since the merger must be equitably divided between El Paso and new company.

Assuming that each estimate of the reserves which El Paso proposes to divest is accurate, if the Basin Dakota reserves retained by El Paso are reduced by the same proportion as the expert witnesses reduced New Company's Basin Dakota reserves, but the retained Pictured Cliffs and Mesaverde reserves are not reduced, New Company will receive a greater proportion of the total system reserves than PNW had on January 1, 1957, and as great or a greater proportion of the San Juan reserves than PNW had on January 1, 1957, with two minor exceptions. (See El Paso Exhibit 108.) Colonial's estimate of PNW's share of the San Juan reserves on January 1, 1957, is 20.4 percent versus 20.1 percent on January 1, 1967, and Pacific Western's estimate is 17.2 percent on January 1, 1957, versus 16.9 percent on January 1, 1967. A summary of this portion of El Paso Exhibit 108 is set forth in tabulated form on the following page.

	New Company	Aspen	Colonial	CIG	PW	R-H	WS
1-1-57							
San Juan (%)	21.4	17.2	20.4	21.2	17.2	19.3	22.0
Total System (%)	18.2	14.7	17.5	17.3	15.8	16.6	18.4
1-1-67							
San Juan (%)	21.8	18.0	20.1	21.3	16.9	19.8	22.4
Total System (%)	23.5	18.4	22.5	21.8	20.4	21.7	23.7

The Court finds that the gas reserves proposed to be divested to New Company by El Paso are no less in relation to present existing reserves than PNW had when it was independent, and that El Paso's proposal satisfies that guideline of Cascade.

We now consider the second requirement of Cascade, that there be an equitable division of the reserves developed since the merger.

The reserves developed since the stock acquisition are set forth in El Paso Exhibit 61(d) on an annual basis together with the annual production from the total reserves. On the basis of El Paso's reserve estimates, New Company will receive over 50% of the net additions to the reserves (new reserves minus production) developed since the stock acquistion. Essentially the same result is reached if the other reserve estimates in evidence are used and adjusted for a reduction of El Paso's *retained* Basin Dakota reserves in the same proportion as the reserve estimates reduced El Paso's estimates of the Basin Dakota reserves to be *divested*. (El Paso Exhibit 108.) Using the reserve estimates of Aspen, et al, so adjusted, New Company will receive from 45 percent (Aspen) to 60 percent (Colonial) of the net additions to the reserves since the stock acquisition. If a computa-

tion were made as of the date of the merger, the proportion of the net addition to reserves divested to New Company would probably be higher.

If an equitable division of the reserves developed after the merger or the stock acquisition is to be measured by the division of net additions to reserves, El Paso's proposal would be fair and equitable. Although the net addition to reserves divested and retained is a factor for the Court's consideration, the Court finds that it is neither the sole nor principal criteria for an equitable division.

If the division of the reserves is to be measured by the requirements of New Company to serve the northwest division and to supply a project by which New Company would compete in the California market, the Court finds, and it is admitted by most of the parties in interest if not all of them, that the present total system reserves by any estimate in evidence are not sufficient to meet those requirements of New Company and the requirements of the southern division. To divest to New Company reserves to meet the above requirements would necessarily require the invasion of reserves which are dedicated to the service of the southern division. So also would a reserve guarantee by El Paso of 9.2 TCF invade reserves dedicated to the service of the southern division, if El Paso's reserve estimates are too high.

The Court finds that such an invasion would not be equitable and particularly so since the invasion of reserves dedicated to the service of the southern division is not necessary to place New Company in a position where it can compete in the California market.

For New Company and El Paso to be competitors for future increments to the California market will require that both seek new reserves. The evidence discloses two areas of promise available to New Company — Canada and the Rocky Mountain area. West Coast Transmission Company has indicated its willingness to supply 400,000 MCF per day to New Company. (El Paso Exhibit 44.) There is evidence of gas availability to New Company in gas fields in the Rocky Mountain area if a market is established.

The government-industry experiments with the use of nuclear energy to increase gas recovery from tight formations by explosions in the well bore (gas buggy) offers at least some hope of increasing the recoverable gas in the domestic reserves to be divested to New Company and retained by El Paso.

The Court is satisfied that capable management of New Company can obtain the reserves necessary to compete in the California market without invading the reserves dedicated to the service of the southern division.

Although total reserves are important, one of the best and most important measures of an adequate gas supply is the length of time it will deliver into the pipeline the full requirements of the system. This is known in the industry as "deliverability life." El Paso estimates that under its proposed divestment of gas reserves, that New Company will have a 12-year deliverability life and that the reserves retained by El Paso will give it a 10-year deliverability life.

Aspen's estimtaes show a deliverability life of five years for New Company, (Aspen's Exhibits 7 and 8)

but Mr. Gruy, Aspen's expert, testified the defiiciencies are not great for the first ten years, and that overall El Paso's proposal was fair and equitable.

Colonial's Exhibit 25 shows an 11-year deliverability life.

Colorado Interstate's Exhibit 11 shows a deliverability life of three years, but the deficiencies are small until the year 1974. Colorado Interstate's Exhibit 12 shows an annual availability or deliverability life for New Company of ten years with Colorado Interstate's proposed modification of the Sumas Exchange Agreement.

Pacific Western's Exhibit 21, page 2, shows New Company's deliverability life as ten years.

Rosenblatt-Husky's Exhibit 4, Tab 14, shows for all practical purposes, a deliverability life of seven years for New Company.

Western States' Exhibit 14, page 2, estimates New Company's deliverability life as eleven years.

Although this evidence is to some extent conflicting, the Court finds that under El Paso's proposal, New Company will have a deliverability life of at least ten years from January 1, 1967; that its deliverability life will at least equal El Paso's deliverability life after divestiture; that New Company's deliverability life of ten years is equal to the national average pipeline deliverability; that under El Paso's proposal, New Company will have a reserve life index of not less than 20 years nor more than 27 years; that this is in excess of the national average which is 16 years and will be at least equal to El Paso's reserve life index upon divestiture.

Under the El Paso plan, El Paso proposes the reinstatement of the Sumas Exchange Agreement, which would require New Company to sell to El Paso from its San Juan Basin reserves, 100,000 MCF per day. Although New Company would be reimbursed by El Paso at the rate of $.25 per MCF, nevertheless, the effect of the reinstatement of the Sumas Exchange Agreement will be that New Company will not be able to utilize 100,000 MCF per day of the reserves divested to it either in the service of the northwest division or as a nucleus of a supply to compete in the California market.

The Court finds that the division of the gas reserves as proposed by El Paso is fair and equitable if the divestiture is freed from obligation to continue to supply gas to El Paso under the Sumas Exchange Agreement. However, since this 100,000 MCF per day constitutes a part of the reserves supplying the southern division, it would be inequitable to deprive El Paso of that gas without reasonable notice. The Court determines that a period of one year is a reasonable time for El Paso to replace the Sumas Exchange Agreement gas with other reserves and that El Paso after June 30, 1969, shall be entitled to no gas supplies by virtue of the Sumas Exchange Agreement.

We have not overlooked the Government's suggestion that not only should the Sumas Exchange Agreement not be reinstated, but that El Paso should divest an additional 100,000 MCF per day from El Paso's reserves in the San Juan Basin or the Permian Basin. The Government recognizes that this proposal would divert to the New Company, gas reserves presently dedicated to the southern division. The Government, how-

ever, justifies this invasion of the southern division reserves on the ground that El Paso could replace these reserves in the Permian Basin without paying a higher price, and also because El Paso has demonstrated an ability to acquire large quantities of reserves within short periods of time when necessary. The Court has carefully considered the Government's suggestion, but does not accept it for the principal reason that it would be inequitable to invade reserves which are dedicated to the service of the southern division, in view of the Court's finding that the management selected by the Court for New Company is capable of obtaining for itself gas reserves to support its competition in the California market.

CASCADE GUIDELINES AND QUESTIONS FOR DETERMINATION

Any plan of divestiture necessarily requires a determination of:

1. What is to be divested;
2. To whom it is to be divested;
3. How it is to be divested.

These determinations must result in a New Company being at once being restored to a position where it can compete with El Paso in the California market.

The Cascade guidelines in making these determinations are:

> "(1) Gas Reserves."
>
> "The gas reserves granted to New Company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed

since the merger must be equitably divided between El Paso and the New Company.

"(2) Financial Aspects."

a. "Consider the disposition of the West Coast Transmission stock in the light of the New Company's need for working capital necessary to restore the competitive balance that the merger destroyed.

b. "Consider reimbursement of New Company by El Paso for the use by El Paso of the tax losses of Pacific Northwest.

"(3) Control of El Paso."

"To insulate New Company from El Paso control, the plan should:

a. Ensure swift severance of the illegal combination and make sure New Company stock does not end up controlled by El Paso interests.

b. Require disposition of all of the stock of New Company held by El Paso with all convenient speed.

c. Impose conditions to make sure that El Paso interests do not acquire a controlling interest in New Company.

d. Consider the prospects of an outright purchase of the assets of New Company or its stock by outside interests as a means to accomplish insulation of New Company from control by El Paso interests."

A plan which will comply with the foregoing requirements and which will best accomplish the objective sought, must of necessity be tailored to some extent to fit the successful applicant.

For reasons which will later appear, the Court has selected Colorado Interstate Gas Company (CIG) as the successful applicant, and the plan adopted is one which

in the Court's opinion is best suited to enable that successful applicant to accomplish the objectives sought by the divestiture. This plan may not be suitable for other applicants.

If, for any reason, final divestiture should not be made to CIG, a different plan may be adopted. For that and other reasons, the Court retains jurisdiction to alter, amend, modify, and supplement the plan and these findings and conclusions until a final decree of divestiture is entered.

Where findings of fact and explanatory material will interrupt the continuity of the discussion of the plan and the reasons for its adoption, they are contained in an Appendix which is attached and made a part hereof by reference.

DISPOSITION OF WEST COAST AND NORTHWEST PRODUCTION COMPANY STOCK

(See Appendix for background and detail.)

Cascade states:

> "It is also earnestly argued that the New Company will sorely need the valuable and fairly liquid stock of West Coast Transmission if it is to have the working capital necessary to restore the competitive balance that the merger destroyed."

The Court finds that some of the applicants would need either the stock of the West Coast Transmission Company or the funds derived from its sale divested to New Company in order that New Company may have the working capital necessary to restore the competitive balance that the merger destroyed.

However, the Court finds that the successful applicant selected by the Court does not need nor does it want the West Coast Transmission stock or the funds derived from its sale, and that it is ready, willing, and able to supply all working capital required to restore the competitive balance.

Both West Coast and Northwest Production supply gas to the Northwest division and for this reason, if for no other, divestment by El Paso should be required. Since the stock of these companies is a non-utility asset and does not form a part of the rate base, there is no compelling reason that New Company acquire it.

In the event of the final certification of the successful applicant, these stocks should be divested by El Paso by sale to persons satisfactory to the Court and the sale accomplished as soon as practical after final certification.

TAX LOSS CARRY-FORWARD

Cascade states:

> "It is also pointed out that some $53,000,000 of taxable loses which Pacific Northwest had were utilized by El Paso during the years following the ill-starred merger. It is argued that since these tax loss carry overs were in a real sense an asset of Pacific Northwest utilized by El Paso, the New Company should receive other assets or a reduction in debt of equivalent value. These allegations, if proven, require remuneration of some kind to the New Company; for it must be a viable healthy unit, as able to compete as Pacific Northwest was when it was acquired by El Paso."

The facts concerning the utilization of the tax losses of Pacific Northwest, for the most part, are not in dispute.

Prior to the merger on December 31, 1959, Pacific Northwest had failed to generate earnings and had accumulated tax losses of $23,000,00 of which $9,000,000 was generated in 1955. The tax losses generated in any year could be carried forward for five years, but if not utilized within the five-year period, were lost.

In 1959, PNW generated additional tax losses in excess of $3,000,000, and it appeared the $9,000,000 of tax loss for the year 1955 was about to be lost. By virtue of the merger on December 31, 1959, the merged companies were able to utilize the $9,000,000 tax loss which otherwise could not have been utilized.

The tax losses generated by Pacific Northwest for the years 1955 to 1959 were approximately $53,000,000, a part of which was due to the taking of accelerated depreciation. These tax losses were of no value to Pacific Northwest during those years because it had no taxable earnings to which these previous losses could be applied, although it is possible that PNW would have generated some income in later years whereby some portion of the loss could have been used before the five-year limitation expired.

The tax loss was of value to El Paso because it was in a position to generate taxable earnings against which the losses could be applied and its taxes reduced. By utilizing the tax losses, El Paso's cash flow was increased and thereby El Paso was able to and did maintain lower rates in the northwest division than otherwise would have been possible. The lower rates resulted in an increased load which was necessary to change the northwest division from a loss to a profitable operation. Al-

though the tax savings were at least in great measure flowed through to the customer in the northwest division by these low rates, El Paso also benefited by the conversion of the northwest division from a loss to a profit operation.

The tax savings realized by use of accelerated depreciation was the subject of a show cause order and a proceeding before the Federal Power Commission in 1966. It was disposed of on an informal basis with the agreement of the customers in the northwest division and resulted in placing in a reserve account, the sum of \$19,945,000 (Tab 1 of El Paso Exhibit 1) which is amortized over a 13-year period at the rate of 7½ percent a year and charged to income. This has the effect of reducing rates in the northwest division by the amount of the annual amortization. This reserve account is an obligation which will presumably be taken into account in fixing the amount of reimbursement El Paso will receive. Similarly, if El Paso should be required to reimburse New Company for the use of the tax losses, this would increase the value of New Company assets to be paid for by the successful applicant. The successful applicant does not need any such reimbursement for working capital or other purposes and does not wish any reimbursement be made. The Court finds that remuneration by El Paso is not required to make New Company a strong, viable, and healthy company, and that reimbursement would not materially add to New Company's ability to compete in the California market.

MOBIL NOTES

At the time of the merger, there was in existence between PNW and Mobil, a contract relating to the development of the Piceance Creek field. Upon the merger, El Paso assumed the obligations of PNW under this contract and now proposes to divest the contract to New Company, subject to the remaining obligations thereunder.

In essence, the contract required PNW to advance 90 percent of Mobil's cost of drilling the wells in return for which PNW obtained the gas produced at less than the prevailing price.

The remaining amount due Mobil is approximately $500,000, but the quantity of gas which is still deliverable at the reduced rate would result in a savings of over $1,000,000.

The Court finds that this contract will be beneficial to the New Company, and that this contract should be divested to New Company and New Company should assume the obligations of the contract remaining at the time the divestiture is made.

INTER-COMPANY AND MISCELLANEOUS CONTRACTS

The testimony refers to various agreements, which are summarized below with the Court's determination of their disposition.

SUMAS EXCHANGE AGREEMENT

(See Appendix for the details of its negotiation.)

This agreement was entered into between PNW and El Paso August 23, 1955. The effect of the agreement is that El Paso agreed to purchase 100,000 MCF per day from PNW in the San Juan Basin for $.25 per MCF for a period of twenty years.

El Paso proposes to reinstate the agreement. The Court, in dealing with the division of ~~gas reserves,~~ has determined it should be reinstated, but should terminate on June 20, 1969.

COLORADO INTERSTATE, PACIFIC NORTHWEST, & EL PASO CONTRACT

Pacific Northwest and Colorado Interstate had entered into a contract providing that beginning in the fall of 1956, Pacific Northwest would sell a certain quantity of gas to Colorado Interstate for delivery near Rock Springs, Wyoming, for Colorado Interstate's line which was then under construction and which would meet Pacific Northwest's line. Colorado Interstate was unable to complete its line to that point, and consequently Pacific Northwest was unable to make delivery and CIG was unable to receive the gas. CIG intended to raise the defense of force majeure. This contract was Pacific Northwest's largest sale and was important to its economic health.

As a result, Pacific Northwest, Colorado Interstate, and El Paso entered into an agreement providing:

1. Colorado Interstate would pay to Pacific Northwest the full price for the gas it con-

tracted to purchase; but Colorado Interstate would take delivery of the gas from Pacific Northwest at Ignacio, Colorado, in the San Juan Basin.

2. El Paso agreed to buy this gas from CIG, taking delivery from CIG at Ignacio.

3. Colorado Interstate agreed that at a time in the future, it would buy back from El Paso, the gas El Paso had purchased from CIG, deliver the gas to CIG at El Paso's Station 6 near Rock Springs, Wyoming. Pacific Northwest agreed to transport the gas from the San Juan Basin to that delivery point free of charge because Pacific Northwest had already been paid by Colorado Interstate for the cost of transportation.

Since the merger of El Paso and Pacific Northwest, Colorado Interstate has bought back all but 6 BCF of gas with El Paso making the delivery at Colorado Interstate's Station 6 without transportation charge.

Subject to the approval of the Federal Power Commission, this contract should continue in force and effect until completed, and New Company should assume El Paso's obligations to deliver the gas to CIG without charge for transportation.

100-100-100-60-40 CONTRACT

Reference has been made in the testimony to this contract. This was an agreement dated August 2, 1956, entered into between PNW and El Paso. It resulted from the fact that PNW did not have adequate gas supplies and was not in a position to raise sufficient funds to drill the wells on its San Juan acreage which were necessary to give PNW the needed supplies. El Paso

agreed that it would sell to PNW, 100,000 MCF per day for three years, 60,000 MCF per day during the fourth year, and 40,000 MCF per day for the fifth year. The gas was to be delivered to PNW in the San Juan Basin. Two years after the above deliveries were completed, PNW was to begin to sell the same quantity of gas back to El Paso.

Fifty-six BCF of gas was delivered to PNW under this contract prior to the merger. After the merger, there were no further deliveries made under this contract.

The Court finds no reason to reinstate this agreement.

KINGSGATE EXCHANGE

On May 25, 1957, El Paso concluded negotiations on behalf of PNW which was then El Paso's wholly-owned subsidiary, with West Coast Transmission Company for 150,000 MCF of gas per day to be delivered at the international boundary at Kingsgate, British Columbia. Both the Federal Power Commission and the Canadian National Energy Board expressed concern that PNW would be unable to take that volume into its system in view of its market requirements. To provide assurance that its subsidiary would be able to meet its contract, El Paso offered to enter into a contract with PNW to take such volumes of the gas imported at Kingsgate as PNW might find itself unable to digest. This agreement was never executed because PNW was merged into El Paso before the gas began to flow.

El Paso does not propose to enter into a similar agreement with New Company because New Company will need the full yearly volumes of gas it is entitled to import at Kingsgate to serve its expanded markets.

The Court finds the agreement was never consummated, and there is no reason for New Company to enter into such an agreement at this time.

SAN JUAN GAS GATHERING AGREEMENT

Prior to the merger, PNW and El Paso had entered into a mutual gas gathering in the San Juan Basin under a contract which is in evidence as El Paso Exhibit 4. That contract covered only 126 wells producing gas from one formation in a limited area.

Whether or not New Company and El Paso should enter into a mutual gas gathering agreement is a matter for negotiation by the parties, subject to scrutiny and approval or disapproval by the Federal Power Commission.

JACKSON PRAIRIE FIELD STORAGE PROJECT

This project is also known as the Chehalis Gas Storage Project.

This is a test storage project in which Washington Natural Gas Company, Washington Water Power Company, and El Paso each own one-third interest. The project is on leased land, a short distance from Seattle, Washington. It is a test project and differs somewhat from most gas storage projects in that the gas is being injected into a waterbearing sand or aquifer. It is estimated that it will have a total capacity of 20 BCF.

The project is still under development and testing, and as of December 1, 1967, 5-2/10 BCF of gas has been stored. So far there is no evidence of leaking.

The project represents an investment to date of approximately $7,000,000 by the three companies.

El Paso proposes to divest to New Company its one-third interest in this project.

The Court finds that it would be to the best interests of New Company that El Paso divest its one-third interest in this project to New Company, and that New Company assume El Paso's obligation in connection with the development and operation of the project as conceived by the three parties.

TO WHOM ARE THE ASSETS TO BE DIVESTED

There are actually two questions to be determined. First, what is the identity of the New Company to which the divested assets will be transferred, and what applicant should be selected to acquire the management and control of that entity?

The Court finds that New Company may obtain tax advantages if the corporate entity to receive the divested assets is "Northwest Pipeline Corporation," a Delaware corporation which El Paso caused to be incorporated in 1965, and the Court finds nothing in the evidence which would indicate any reason why this corporate entity should not be utilized. However, we will continue to refer to that entity as "New Company."

The Court has already indicated its selection of the successful applicant and here sets forth its reasons for that selection.

The selection of the successful applicant involves the preliminary question of whether the Court should select the applicant which, in the Court's opinion, is best qualified to carry out the mandate that " - - - a new company be at once restored to a position where it could compete with El Paso in the California market," or (as El Paso contends) should the Court select all applicants which the Court finds are qualified to accomplish the objectives sought and instruct El Paso to negotiate " - - - a binding agreement - - - with each of the qualified applicants, and following presentation of the agreements to the Court, select the successful applicant." (page 41, El Paso Brief.) The successful applicant which the Court would select, in El Paso's view, would be the one offering the highest price.

The Court finds, as do most of the intervenors, that all of the applicants are not equally qualified to make New Company a competitive factor in the California market. The Court also finds that of those applicants who are so qualified, all do not have the capability of furnishing the same degree of competition. The Court conceives its duty to be to select not only an applicant qualified to make New Company a competitive factor, but the applicant which in the Court's opinion can and will furnish through New Company, the greatest degree of competition and the greatest impact on the California market.

To select less than the strongest and best qualified applicant, gives to El Paso an unwarranted advantage in the competitive race for the California market, and particularly so when in the Court's opinion, New Company will be confronted with a much more formidable

task in becoming such a competitive factor than was PNW for reasons which follow.

COMPETITION 1967 vs. 1957

In 1957, the only California market for an out-of-state gas supplier were the natural gas distributors in California consisting of Pacific Gas and Electric Company in the north and the southern companies in the south, together with Edison and perhaps some other large gas consumers. In 1967, the market for the out-of-state supplier remains the same. In other words, although the consumption of gas in the state of California has expanded at a rapid rate since 1957 and still continues to expand, the possible purchasers from out-of-state suppliers has not expanded in numbers and the competition to supply this limited number of purchasers is more intense.

In 1957, El Paso was the only out-of-state supplier of gas to the California market. In 1967, there were three interstate pipelines supplying out-of-state gas to the California market: El Paso and Transwestern (recently acquired by Texas Eastern) serving the southern California distributors and Pacific Gas and Transmission Company, controlled by PG & E, which transports Canadian gas to California to supply the needs of PG & E. Consequently, New Company will be faced with two entrenched competitors in the south instead of one and confronted with the fact that the principal market in the north, PG & E, has its own out-of-state supplier in PG & T.

That El Paso is a stronger competitor today than in 1957 is indicated by the growth of its gross revenues

from gas sales from $198,000,000 in 1957 to an estimated $370,000,000 in 1968, and an increase in its gross utility plant since 1956 of over $700,000,000. (El Paso Exhibit 111.)

The New Company's other competitor in the south, Transwestern and its parent, Texas Eastern, for the year 1966 ranked first in the nation in terms of total gas sales revenues which were in excess of $390,000,000.

In comparison to its competition, New Company's 1968 gross revenues from gas sales are estimated at $118,800,000. (El Paso Exhibit 1, Tab 10.)

Although this competition is formidable, the evidence indicates that it is not impregnable. The southern companies state that their incremental market requirements are sufficient to support a pipeline to California by 1970, and they welcome competition. Edison is seeking an out-of-state supplier.

Although the expanding California market appears to offer opportunities for New Company to enter the market, the recommendation of the Federal Power Commission staff that a 42-inch pipeline should be constructed to California is a matter of grave concern, for according to the evidence before the Court, a 42-inch line would serve all increments to the southern California market for the forseeable future. The Supreme Court recognized that competition in the California market is limited to future increments, which have not yet been certificated for service. Once an increment has been certificated, it is withdrawn from competition. The recommendations of the Commission's staff for the construction of a 42-inch line have been commended by the

FPC examiner in a current proceeding as "bold and constructive." The Government in its Brief at page 9 states:

> "It is clear that the 42-inch concept is gaining ground; it has already been accorded a respectful reception in the FPC's Order of March 5, 1968. (California-Edison Motion, page 4.)"

The Government at the same page of its Brief also states:

> "It is too early to predict the ultimate direction or final outcome of this current FPC proceeding. The opportunity it presents to the new company which is to emerge from this law suit is evident. If a full scale 42-inch proceeding gets underway, either in this current FPC case or in some later one, the new company should be equipped to enter as a contender with at least the minimum qualifications for serious consideration."

The Court agrees and adds that for New Company to be a serious competitor for a prize of that magnitude will require the most experienced management and the strongest financial backing which is available to it, and it is imperative that the strongest applicant and the one best qualified to make New Company a serious competitor in these circumstances be selected as the successful applicant.

SELECTION OF THE SUCCESSFUL APPLICANT

The Court here sets forth its reasons for selecting CIG as the successful applicant.

CIG has been engaged in the operation of a natural gas transmission system along the eastern slope of the Rocky Mountains since 1928. Its system is presently

physically connected with that of the New Company near Green River, Wyoming. Although other applicants for acquisition have in their organization men with experience in the natural gas transmission business, none of the applicants with the exception of Paradox, have had any history of operations in this field, and Paradox is not so engaged at the present time.

CIG is the only applicant which has a presently functioning organization with experienced management and personnel which gives it the capability to restore New Company to a competitive position in a much shorter period of time than could be done by any other applicant. Because of the present competitive situation, time is of the essence.

It has had a wealth of experience in proceedings before the Federal Power Commission; it is financially able to supply all working capital needed by New Company, and its financial strength will assure the financial ability of New Company to finance an invasion of the California market if and when so authorized by the Federal Power Commission.

It has demonstrated its ability to acquire reserves for its own system in the past, which indicates its present ability to acquire for New Company, reserves to meet the expanding requirements of the northwest and to compete in the California market.

By its acquisition of all of the common stock of New Company, CIG has perhaps a greater incentive to expand to California than those applicants who would acquire a leasser interest, for it has more to gain if it is successful in gaining a foothold in this rapidly expanding market.

Edison would disqualify CIG from consideration because it did not or would not make a clear and unequivocal committment to serve Edison directly. We think this is not a prerequisite for selection. A direct sale to Edison is only one way to enter the California market and it would be a mistake, if not improper, for this Court to dictate how New Company should or should not attempt to compete.

We have again read and considered the testimony of the CIG witnesses referred to by Edison at page 64 of its Brief and find therein no statement of policy or position which would cause this Court to disqualify CIG from consideration. The witnesses did not commit CIG to serve Edison directly, but also they did not rule out the possibility of a direct sale.

SHOULD CIG BE EXCLUDED FOR COMPETITIVE REASONS?

The Government has raised the questions of whether or not CIG is now a potential competitor for the California market and "to a lesser extent" a potential competitor with New Company for Rocky Mountain reserves and for its existing customers in the Pacific Northwest.

The Government states at page 32 of its Brief:

> "We do not think, however, that CIG should be automatically excluded from consideration here because it is now a potential competitor for the California market. If the combination of CIG and the New Company were to create a considerably stronger competitor for the California market than either one could possibly be alone, the Court could validly conclude that such a combination is pro-competitive rather than anti-com-

petitive, and entirely consistent with the mandate of the Supreme Court."

The Government, in its Brief, discusses the pro's and con's of the question of whether or not CIG should be disqualified and concludes that it is a close question. The Court has given careful consideration to the evidence bearing upon these questions.

The facts to which the Government points indicating that CIG is *now* a potential competitor for the California market are:

1. Its geographical situation gives it an advantage over other major interstate pipelines, except the Pacific Northwest line with respect to the California market.
2. It is an established, experienced, conservatively financed company and would seem far better able than most companies successfully to finance a large-scale pipeline extension.
3. That CIG should be able to gain access to gas reserves needed for the California project.

Other evidence bearing on the determination of this question is the testimony of Mr. King and Mr. Pelican of CIG which is not controverted in any material respect.

This testimony is summarized in CIG's Brief at pages 68 to 85 and need not here be repeated in detail, but it shows that CIG's major markets are on the eastern slope of the Rocky Mountains, while New Company's markets are on the west side of the Continental Divide. Approximately 80 percent of CIG's gas supply is in the Anadarko Basin in Texas, Oklahoma, and Kansas, while New Company will derive its supplies principally from Canada, the San Juan Basin in New Mexico, and the Big

Piney fields in Wyoming. Presently, there is no field from which both systems are taking gas.

In Wyoming, New Company obtains supplies from the Big Piney field which is about 75 miles from the nearest point on CIG's system, and CIG obtains about 5 percent of its supply from the Desert Springs field which is also 75 miles distant from the New Company's system.

In Colorado, New Company's supplies are located west of the Continental Divide and along the western and southwestern borders of Colorado, while CIG's supply areas in Colorado lie far to the east and access is barred by the Continental Divide.

As to CIG's possible competition for New Company markets, there is no evidence that CIG has shown any interest in the Pacific Northwest, or that CIG's geographical position or its standing in the industry has had any impact on the competitive situation in that area. The major growth of markets in the Pacific Northwest are along the western portion of the New Company's system and are far removed from CIG's present line. There is no evidence that the incremental demands in the Pacific Notrhwest area are sufficient in size to support an expansion by CIG into that area. It appears that the more likely competition in the Pacific Northwest area will come from Canadian gas transported by Pacific Gas Transmission Company, West Coast, or some other company utilizing Canadian gas.

Any potential of CIG as a competitor to New Company in the northwest, in the Court's opinion, is not of sufficient magnitude to exclude CIG from consideration.

Referring now to the California market, in 1958, CIG had an excess supply of gas for which it desired to find a market. Among the attempts to dispose of it was a proposed joint venture with El Paso to take gas from the western terminus of CIG's line at Rock Springs, Wyoming, to a point on the California border. CIG was to provide 300,000 MCF per day of the 400,000 MCF needed to commence initial delivery. This has been referred to in the testimony as the Rock Springs project. The application for the project was denied by the Federal Power Commission.

Except for this one incident, there is no evidence of any attempt by CIG to become a competitor in the California market, and there is no evidence that CIG's financial strength and its geographical situation has had any impact upon or has been a factor in the competition for the California market.

From the evidence before the Court, CIG is not and since the failure of the Rock Springs project has not been a competitor for the California market, and that acting alone, its potential for being a competitor in the California market in the foreseeable future is so uncertain that it should not be grounds for the exclusion of CIG from consideration.

The Court is satisfied that CIG, standing alone, has little chance of affecting competition for the California market; but the Court is equally convinced that of the alternatives available, the combination of CIG and the New Company will create the strongest competitive potential for the California market.

For the reasons stated under the heading, "Competition 1967 vs. 1957" (supra), the Court reiterates its conviction that to restore the competition required by the Supreme Court's mandate demands the strongest competition potential available.

HOW THE PROPERTY IS TO BE DIVESTED

This part of the plan provides a method of divestment which, among other things, will accomplish the insulation of New Company and the successful applicant from El Paso control as required by Cascade.

The alternative methods or means of divestiture available to the Court are:

1. A cash sale;
2. A transfer of the divested assets to a New Company and a private or public cash sale of the stock of New Company; or,
3. A transfer of the assets in exchange for stock; or,
4. A combination of one or more of the foregoing.

Implicit in all of these alternatives is that the acquirer of the property will assume some portion of El Paso's bond and debenture indebtedness, and that the foregoing methods are the available means of disposing of the equity.

Although a sale of the assets to be divested for cash or a transfer of the assets to a New Company and the sale of all of the New Company common stock for cash would effectively accomplish the insulation of El Paso from control of the divested system, El Paso would suffer adverse tax consequences.

The Court is of the opinion that the stock exchange plan proposed by CIG will also adequately and effectively insulate New Company and the successful applicant from El Paso control, is better suited to enable CIG to proceed promptly with the steps necessary to enable it to become a competitive factor in the California market, and may avoid adverse tax consequences to El Paso.

Again the Court recognizes that this plan may not be the one best suited to a different applicant, and if for any reason a different applicant should be selected, a different plan may be established.

BASIS FOR REIMBURSEMENT

The basis for reimbursement to El Paso should be the fair market value of the equity in the assets divested at the time of divestment, determined by negotiation between the successful applicant and El Paso, and if they are unable to agree within the time allotted by the Court, the fair market value should be determined by the Court.

HOW REIMBURSEMENT WILL BE MADE

1. New Company will assume approximately $170,000,000 of El Paso's bond and debenture debt and assume the payment of the cost of the debt roll over of one-eighth of one percent increase in the interest rate. In satisfaction of this assumption, New Company will issue to holders of El Paso bonds and debentures, bonds and debentures of New Company of like tenor and effect, but with an interest rate one-eighth of one percent greater than the rate applicable to the securities of El Paso which will be surrendered and cancelled.

2. New Company will issue to El Paso, preferred stock (convertible into common stock of CIG) equivalent in amount to the fair market value of El Paso's equity. This stock may be retained by El Paso or disposed of by El Paso as it sees fit. The exact terms and conditions of the preferred stock and the provisions pertaining to conversion shall be negotiated by CIG and El Paso, and in case of failure to agree, such determinations shall be made by the Court.

3. New Company shall issue to CIG, all of the common stock of New Company in exchange for $5,000,000 in cash and common stock of CIG sufficient in value to satisfy the conversion requirements of New Company's preferred stock.

PROVISIONS FOR INSULATION FROM EL PASO CONTROL

The final decree of divestiture shall contain restrictive provisions to insulate New Company from domination or control by El Paso, its directors, officers, and stockholders, either directly or indirectly.

The restrictive provisions shall be negotiated by El Paso and CIG and submitted to the Court for its consideration. If El Paso and CIG cannot agree, the Court will formulate the provisions.

TIME OF DIVESTMENT

Final divestment shall be consummated as soon as possible after the issuance of a permanent certificate to New Company by the Federal Power Commission. In the interim period, New Company may assume control and

management of the physical plant if so authorized by a temporary certificate issued by the Federal Power Commission.

CIG shall divest itself of any El Paso stock it may own or control prior to assuming control and management of the property.

OPERATING EMPLOYEES IN THE NORTHWEST DIVISION

Those employees of El Paso who are employed in the operations of the northwest division at the time of divestment and who desire to continue their employment with the New Company should, generally speaking, be offered employment by New Company on no less favorable terms and with no less favorable benefits than their present employment provides. This is a statement of principle, and is not intended to vest in any individual employee a right to be employed by New Company. This statement of principal does not apply to those employees holding policy-making positions.

CONCLUSION

The Court is satisfied that under this plan, New Company will be a strong viable company, capable of serving the Pacific Northwest and restoring the competition in the California market which was destroyed by El Paso's acquisition of the PNW stock and the later merger of the two companies.

PROCEDURE TO IMPLEMENT PLAN

The implementation of this plan requires a step-by-step procedure. It is the Court's purpose to here point

out the steps that should be taken and the Court will enter such orders as may be necessary from time to time to carry out the procedures here set forth, or to amend, alter, or supplement these procedures as the facts and circumstances may require.

First Step:

CIG and El Paso shall immediately submit the plan herein contained to the Internal Revenue Service for a ruling on whether or not the divestiture, according to this plan, is a tax-free transaction.

Concurrently, the successful applicant and El Paso shall enter into negotiations to:

a. Determine the amount of reimbursement El Paso shall receive for its equity in the properties to be divested; or, in the alternative, a formula by which the amount may be determined at the time of divestiture;

b. Determine the terms and conditions of the preferred stock and the conversion provisions thereof; or, in the alternative, a formula by which the terms and conditions of the preferred stock may be determined as of the date of divestment;

c. Formulate restrictive provisions to insulate New Company from domination or control by El Paso, its directors, officers, and stockholders, either directly or indirectly;

d. Agree upon such other matters as El Paso and the successful applicant may deem proper.

Any and all agreements which El Paso and the successful applicant may enter into shall not become effective unless and until they are approved by the Court.

The negotiations shall be concluded within 35 days after the entry of these Finds of Fact, Conclusions of Law, and Opinion.

The Department of Justice may, if it so desires, have an observer present at all negotiations between El Paso and CIG under Step 1; and for this purpose, the Department of Justice shall be advised of the time and place of all such negotiations.

Step Two:

El Paso and CIG shall, as soon as possible, commence the preparations necessary to cause New Company to make application to the Federal Power Commission for the necessary certificate to authorize New Company to acquire and operate the divested property. To this end, El Paso shall take the necessary steps to place representatives of CIG in a position to utilize the Northwest Pipeline Company for this purpose and otherwise cooperate with CIG to the end that the applications for temporary or permanent certificates, or both, be presented to the Federal Power Commission with all possible expedition.

Insofar as possible, these preparations should proceed concurrently with the procedures under Step 1.

Step Three:

At the conclusion of the negotiations under Step 1, El Paso and CIG shall report to the Court in writing, the result of these negotiations and the ruling of the Internal Revenue Service, if such a ruling has been made at the time. A copy of this report shall be served upon

all parties in this proceeding entitled to service, including the applicants for acquisition.

If the negotiators have arrived at an agreement on reimbursement for El Paso's equity and the terms and conditions of New Company preferred stock, the Court will then enter an order setting a time within which all parties in interest may file objections to the Court's Findings of Fact, Conclusions of Law, and Opinion and the report of the negotiators and will set a time and place for hearing these objections.

If El Paso and the successful applicant have been unable to agree on the matters requiring agreement, the Court will set a time for hearing and determining the matters in controversy. At that time or some later time fixed by the Court, the Court will hear any objections of the parties in interest to the Court's Findings of Fact, Conclusions of Law, and Opinion and the Court's determination of any controverted matters.

The principal purpose of detailing the procedure is to guide counsel and preserve the appeal rights of the parties. For this latter reason, the Court declares that these Findings of Fact, Conclusions of Law, and Opinion are tentative and interlocutory in character and will remain so until after the parties in interest have had an opportunity to object to the findings and determinations of the Court, be heard thereon, and their objections ruled upon by the Court.

CIG, having been selected as the successful applicant, is now a party to these proceedings and entitled to participate the same as any other party. The unsuccessful applicants have not been and are not now considered

as parties to this proceeding, but retain their position as applicants for acquisition, and, as such, are entitled to be served with all documents as if they were parties.

The Court has purposely not provided for any procedures beyond the applications to the Federal Power Commission for certificates of authority to carry out the plan of divestiture. If further proceedings are required by this Court during the pendency of those proceedings or prior to final divestiture; the Court will establish procedures appropriate to the circumstances which require the Court's further action.

Entered by the Court this 21st day of June, 1968.

Hatfield Chilson
United States District Judge

APPENDIX

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PROCEEDINGS SINCE CASCADE

On April 18, 1967, the undersigned was assigned by the Honorable Alfred P. Murrah, Chief Judge of the Court of Appeals, Tenth Circuit, to the District of Utah to conduct the further proceedings required by Cascade.

On April 21, 1967, this Court entered an Order that a conference with counsel would be had in Salt Lake City, Utah, on June 9, 1967, to discuss procedure and a timetable to determine matters requiring resolution before proceeding with the "de novo" hearings ordered by the Supreme Court.

At the conference on June 9, the United States, El Paso, the Federal Power Commission as amicus curiae, 22 prospective intervenors, and 11 parties who were interested in acquiring the properties to be divested (referred to in these proceedings as applicants for acquisition) appeared and participated in the conference.

Following the conference, the Court vacated the previous Orders of Divestiture and ordered the following pre-hearing procedure:

1. All Motions to Intervene should be filed by June 26, 1967, and would be determined ex parte.
2. El Paso was required to file a plan or proposal for divestiture by August 4, 1967.
3. Applicants for acquisition were required to file their respective plans or proposals for acquisition by August 25, 1967.
4. The parties to these proceedings, including the intervenors, (but excluding applicants for acquisition) were given until September 18, 1967, to file comments upon the plans and proposals for divestiture.

The Court also ordered that the applicants for acquisition could appear at the hearings, produce evidence, and be heard in support of their respective plans and proposals for acquisition, and that applicants for acquisition would be subject to examination by any of the original or intervening parties on matters relating to their respective plans or proposals.

The Court granted 26 Motions to Intervene, denied all Motions to Intervene filed by applicants for acquisition, and ordered that the previous Order of the Court allowing the Federal Power Commission to appear amicus curiae should remain in force.

On September 6, 1967, the Court ordered the "de novo" hearings to commence at 10:00 a.m. on Monday, October 16, 1967, in the Federal District Court at Ogden, Utah. (The hearings were held at Ogden because the only Federal District Courtroom in Salt Lake City large enough to accommodate the large number of counsel was not available for these proceedings.)

By the same Order of September 6, 1967, the Court ordered a pre-hearing conference be held in Salt Lake City on September 28, 1967 (later changed to October 3):

1. To delineate the questions which would be the subject of the hearings and prescribe the order of their hearing and determination;
2. To determine the order of presentation of evidence and the time required for that purpose;
3. To discuss and determine any other questions of procedure.

At the conference on October 3, there was a tentative delineation of the issues and the adoption of rules of procedure.

The hearings were commenced at Ogden, Utah, on Monday, October 16, 1967.

Some intervenors failed to file Comments on the proposed plans and did not participate in the hearings.

Originally there were 12 applicants for acquisition. Two withdrew (Northwest Pipeline Corporation and Transcontinental Gas Pipeline Corporation) and Husky Oil Company joined forces with Rosenblatt, and they were thereafter referred to as Rosenblatt-Husky.

The remaining nine applicants for acquisition are:

Aspen Pipeline Company
Colonial Natural Gas Company
Colorado Interstate Gas Company
Continental Pacific Corporation
Great Lakes Carbon Corporation
Pacific Western Pipeline Corporation
Paradox Production Corporation
Rosenblatt-Husky
Western States Pipeline Corporation

The 22 intervenors who participated in the hearings are:

Arizona Corporation Commission
Arizona Public Service Company
Tucson Gas and Electric Company
State of California
Public Utilities Commission of California
Cascade Natural Gas Corporation
Public Utilities Commission of Colorado
Idaho Public Utilities Commission
Mountain Fuel Supply Company
Nevada Public Service Commission
Northwest Natural Gas Company
Oregon Public Utilities Commission
Pacific Gas and Electric Company
San Diego Gas and Electric Company
Southern California Edison Company

Southern California Gas Company
Southern Counties Gas Company of California
Southwest Gas Corporation
Utah Public Service Commission
Washington Natural Gas Company
Washington Water and Power Company
Washington Utilities & Transportation Commission

The de novo hearings were held in Ogden, Utah, from October 16, 1967, to November 15, 1967; were then recessed until January 8, 1968, at which time, by unanimous consent of the parties, the hearings were resumed in Denver, Colorado. The taking of evidence was concluded on March 21, 1968, and the following briefing schedule was ordered:

Applicants for Acquisition by April 1, 1968;

Intervenors and Federal Power Commission by April 16, 1968;

El Paso by May 1, 1968;

United States by May 10, 1968; (Extended to May 15, 1968.)

El Paso Reply to the United States Brief by May 18, 1968; (Extended to May 25, 1968.)

Oral argument was had on June 3, 1968.

CANADIAN GAS SUPPLY

Sumas #1, Sumas #2, Kingsgate

The reserves available under these three contracts have been summarized in El Paso's Exhibit 42 and is here set forth.

CANADIAN SUPPLY

From Westcoast Transmission Company, Limited

Contract Date	Term	Termination Date	Daily Volume M^2cf	Reserve 1-1-67, M^2cf
1. December 11, 1954 (First Sumas), attached as Item 1.	20 years	1977	300	1,191.0
2. February 28, 1966 (Second Sumas), attached as Item 2; as Supplemented October 6, 1967, Supplement attached as Item 2S.[1]	20 years	1987	200	1,476.9
3. September 23, 1960 (Kingsgate), attached as Item 3.	20 years	1981	150	765.0
				3,432.9

[1] Note: The Second Sumas, dated February 28, 1966, was filled with the FPC in Docket CP66-315. This contract provided for the following volumes on a minimum 75% load factor:

1. The First Sumas 300 M^2cf/d was extended from 1977 through 1991.

2. An additional Sumas M^2cf/d was provided for as follows:
   (a) 100 M^2cf/d beginning 11-1-66
   (b) 100 M^2cf/d beginning 11-1-67
   (c) 100 M^2cf/d beginning 11-1-69

3. El Paso was given an option to purchase still another 300 M^2cf/d as follows:
   (a) 100 M^2cf/d beginning 11-1-70
   (b) 100 M^2cf/d beginning 11-1-71
   (c) 100 M^2cf/d beginning 11-1-72

The Federal Power Commission in its opinion authorized only the importation of the 200 M^2cf/d shown on lines 2a and 2b above (which is the alternate proposal described on page 6, footnote 9 of El Paso's Plan of Divestiture). This change was incorporated in the February 28, 1966 agreement by supplement dated October 6, 1967. This supplement provides for 200 M^2cf/d at a minimum 90% load factor for a period of 20 years.

Although the second Sumas Agreement provided for the delivery of 300,000 MCF per day and an option to El Paso to purchase still another 300,000 MCF per day, the Federal Power Commission has authorized the importation of only 200,000 MCF per day, and the Federal Power Commission required the execution of a new contract between El Paso and West Coast covering only this 200,000 MCF per day. However, Mr. McMann, Chairman of the Board of West Coast, has indicated that the remaining 400,000 MCF per day would still be available to either El Paso or New Company.

The Sumas gas is delivered to El Paso at the international boundary between British Columbia and the State of Washington near Sumas, Washington.

The Kingsgate gas is delivered by West Coast to Pacific Gas Transmission Company facilities at the Kingsgate import point on the international boundary between British Columbia and Idaho and PG & T delivers the gas to the Pacific Northwest system in Spokane County, Washington.

WEST COAST STOCK AND SUMAS EXCHANGE AGREEMENT

The acquisition of the West Coast stock by PNW and the Sumas Exchange Agreement arose out of the same set of circumstances and the same negotiations and many of the Findings of Fact relate to both transactions.

West Coast Transmission Company and PNW were competitors in a hotly contested proceeding before the Federal Power Commission for a certificate to serve the

Pacific Northwest. West Coast, which was a gathering and transmission company in the Ft. Nelson and Ft. St. John area in Canada, was seeking to serve the Pacific Northwest with Canadian gas while PNW was proposing to serve the same market with gas from the San Juan Basin.

Pacific Northwest prevailed. This left West Coast with a supply of gas and a plan, but no certificate and no prospect of serving the Pacific Northwest.

PNW was relying upon a supply of gas that it had obtained from Phillips and Pan American in the San Juan Basin, but which required that PNW drill the wells. This entailed a large outlay of money which PNW could not raise because West Coast had taken an appeal from the decision of the Federal Power Commission and in the face of this appeal, PNW was incapable of financing either its drilling or construction programs.

Because of this situation, between June of 1954 and December of the same year, negotiations were carried on between West Coast, PNW, and El Paso, seeking a solution.

Out of these negotiations, there grew a three-party agreement whereby West Coast agreed to build a pipeline to Sumas and there deliver to PNW 300,000 MCF of gas per day. This was more gas than PNW felt it could digest and yet that was the minimum amount which West Coast thought would make the pipeline economically feasible. Consequently, El Paso agreed that it would take 250,000 MCF of the 300,000 MFC and dispose of it in the California market. These efforts failed, so El Paso proposed that if PNW would take the 200,000 of the

300,000 MFC, El Paso would take the other 100,000 MCF by purchasing from PNW, 100,000 MCF per day of PNW's San Juan gas at a total price of $.25 per MCF. This arrangement was ultimately approved by the Federal Power Commission and is commonly referred to as the Sumas Exchange Agreement.

Also as a part of this three-way agreement, West Coast agreed to withdraw its appeal from the Federal Power Commission's certification of PNW and that PNW should acquire 25 percent of the West Coast stock at a price of $5.00 per share.

After the acquisition of PNW by El Paso, there was no reason to keep the Sumas Exchange Agreement in operation, and it became inoperative.

ACQUISITION OF WEST COAST STOCK BY EL PASO

PNW acquired 25 per cent (1,127,750 shares) of the West Coast stock in the spring of 1955 in the name of West Coast Investment Co., a wholly-owned subsidiary of Pacific Northwest.

When El Paso, on January 1, 1957, acquired control of PNW through the stock acquisition, it also acquired the stock of West Coast Investment Company and thereby the West Coast stock. It its prospectus issued by El Paso in connection with the stock acquisition, (El Paso Exhibit 3) El Paso listed the West Coast stock as having a market value on January 2, 1957, of $29.00 per share. Presumably, that value of the West Coast stock was included in computing the value of El Paso stock to be exchanged for PNW stock, and the Court finds that El Paso in effect paid the equivalent of market value for

that stock, although for tax purposes, the stock still retained its original cost of $5.00 per share.

After El Paso acquired stock control of PNW and before the merger, the first preferred dividend payment matured on PNW's preferred stock. PNW had no profits with which to pay the dividend. Since the dividend had to be paid out of profits, El Paso bought 220,000 shares of the West Coast stock from PNW at a price of $26.00 per share. Since PNW's book value of the stock was $5.00 per share, this created a profit from which PNW could legally pay its preferred dividends.

After the merger between El Paso and PNW, West Coast issued some additional stock, and the present percentage of the stock owned by El Paso is 18 percent of the total. Also after the merger, El Paso purchased from Pacific Petroleum Ltd., 29,375 shares at a total cost of $526,632.96 which was the market value of the stock.

The Court further finds that El Paso should divest itself of this stock because West Coast is one of the principal suppliers of gas to the New Company, and El Paso, by virtue of its stock ownership, could exercise some influence in the operations of West Coast.

INVESTMENTS

PHILLIPS PACIFIC CHEMICAL COMPANY

Phillips Pacific Chemical Company owns and operates a fertilizer plant near Hedges, Washington, and is a gas customer of the northwest division. El Paso owns 49 percent of the stock of this company, and although its investment in this stock is only $200,000, El Paso's stock interest is now worth approximately $2,641,000. El Paso Exhibit 32 shows that the income of Phillips Pacific for the year 1957 was a net loss of $435,000 and the net income for the year 1966 was $1,306,000. El Paso proposes to divest this stock to New Company. The Court finds that the divestiture of this stock to New Company would be for its best interest.

PACIFIC NORTHWEST REALTY CORPORATION

The Pacific Northwest Realty Company was a wholly-owned subsidiary of PNW, and upon the merger became a wholly-owned subsidiary of El Paso. This company owns a nine-story office building in Salt Lake City, which was formerly the headquarters of PNW. El Paso Exhibit 31 discloses the properties are under lease to El Paso for a term of 25 years ending in 1983. That exhibit also contains the financial statement of this company.

El Paso proposes to divest this company to New Company, and the Court finds that such divestiture is in the best interest of New Company.

NORTHWEST PRODUCTION CORPORATION STOCK

At the time of the stock acquisition on January 1, 1957, PNW owned 69 percent of the stock of Northwest Production Corporation, being 6,664,000 shares. At that time, the stock was being traded over the counter at $6.50 per share, and the shares acquired by PNW represented a value of $43,316,000.

At the time of the stock acquisition, Northwest Production was engaged in the exploration for and production of gas in the San Juan Basin and had had some leases on which some wells had been drilled. It is selling natural gas to El Paso, but these contracts will be transferred to New Company at the time of the divestment.

Northwest Production also owns a gasoline plant located in the Permian Basin in West Texas which is owned by a company called Barnhart, which is a wholly-owned subsidiary of Northwest Production.

El Paso now owns 90 percent of the stock of Northwest Production, the balance of the stock having been acquired since El Paso's stock acquisition of PNW.

Northwest Production does not have any assets of any consequence, other than the leases and the gasoline plant in the Permian Basin.

The Northwest Production acreage has been disappointing and although there has been some wildcat drilling, the majority of its drilling activity has been in the development of proven acreage.

The capital investment of the company is far in excess of the earnings and it operates at a loss. (See Annual Report, El Paso Exhibit 39.)

BELCO PETROLEUM CORPORATION NOTES

In 1957, when El Paso was undertaking to acquire additional reserves in the Big Piney area for the northwest division, El Paso entered into a contract with Belco Petroleum to make advances of funds to be used by Belco for the drilling of wells in the Big Piney area. The agreement called for a line of credit to be extended by El Paso to Belco of $8,750,000. Belco only availed itself of a little over $2,000,000 which is payable to El Paso from 50 percent of the production of the wells drilled, and any balance remaining unpaid on December 31, 1975, becomes due and payable at that time. The balance due at the end of 1967 was $1,125,000. El Paso proposes to divest these notes to New Company. Belco Petroleum is a successful oil producer, and its stock is traded on the New York Exchange. On October 16, 1967, this stock was selling for $43.00 a share.

The Court finds that it would be to the best interest of New Company for El Paso to divest these notes to it.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIVIL ACTION No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS
COMPANY and PACIFIC
NORTHWEST PIPELINE
CORPORATION,
Defendants.

ORDER

Dated June 21, 1968

The Court having this day entered its Findings of Fact, Conclusions of Law, and Opinion:

IT IS ORDERED:

1. That the plan of divestiture set forth in the Findings of Fact, Conclusions of Law, and Opinion this day entered by the Court shall be the plan by which the divestiture required by the Supreme Court in *United States* v. *El Paso Natural Gas Co.*, et al., 376 U. S. 651, and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, et al., 386 U. S. 129, shall be accomplished.

2. That Colorado Interstate Gas Company, having been selected as the successful applicant to acquire control of Northwest Pipeline Company, to which the assets to be divested will be transferred, is hereby made a party to these proceedings.

3. That Colorado Interstate Gas Company and El Paso Natural Gas Company shall immediately proceed to enter into negotiations and comply with the procedures set forth in the "First Step" of the Procedures to Implement the Plan of divestment, which procedures are set forth in the Court's opinion this day entered.

4. That Colorado Interstate Gas Company and El Paso Natural Gas Company shall cause the Department of Justice to be advised of the time and place of all negotiations carried on under the "First Step" of the procedure, and the Department of Justice may have a representative present at all such negotiations if it so desires.

5. That Colorado Interstate Gas Company and El Paso Natural Gas Company shall, on or before July 26, 1968, file with the Court, a report of the results of the negotiations and procedures had pursuant to "First Step" and serve a copy thereof upon all parties to this proceeding and the applicants for acquisition.

Entered this 21st day of June, 1968.

BY THE COURT:
/s/Hatfield Chilson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
Civil Action No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Defendants.

ORDER
Dated August 29, 1968

On June 21, 1968, the Court entered tentative Findings of Fact, Conclusions of Law and Opinion. Thereafter and by Order entered July 30, 1968, the Court ordered:

> "- - - that all patries in interest (not including applicants for acquisition) may file objections to the Court's Findings of Fact, Conclusions of Law and Opinion, and to the report of the negotiators on or before August 19, 1968, and that all objections so filed will be heard at 9:30 A.M. on August 23, 1968, in Courtroom 'C' in the U. S. Courthouse in Denver, Colorado."

Objections to the tentative Findings of Fact, Conclusions of Law and Opinion were filed by the United States, the State of California, Southern California Edison Company, and the Utah Public Service Commission.

On August 23, 1968, the Court heard the objections and took them under advisement and is now advised.

IT IS ORDERED that the tentative Findings of Fact, Conclusions of Law and Opinion entered by the Court on the 21st day of June 1968, are hereby amended in the following respects:

1. In the last sentence of the last paragraph on page 55, the date of "June 20, 1969." is amended to read, "June 30, 1969."

2. There is added at the bottom of page 55 the following:

   "If New Company at that time (June 30, 1969) is in control of the properties to be divested under a certificate of authority issued by the Federal Power Commission, any additional use of El Paso of New Company-San Juan reserves shall be subject to Federal Power Commission regulation.

   "If at that time, (June 30, 1969) New Company is not in control of the properties to be divested pursuant to such a certificate, El Paso and CIG and/or New Company may enter into an agreement permitting El Paso to continue to use not to exceed 100,000 MCF per day of New Company-San Juan reserves, provided that any such agreement shall require El Paso to return to New Company, an equivalent amount of gas; and provided further that when New Company assumes control of the divested properties pursuant to a certificate issued by the Federal Power Commis-

sion, any further use of gas from the San Juan reserves of New Company by El Paso shall be subject to Federal Power Commission regulation."

3. The last full paragraph on page 69 and the last paragraph beginning at the bottom of page 69 and ending on page 70 are amended to read as follows:

"Edison would disqualify CIG from consideration because Edison did not interpret CIG's testimony and Brief as evidencing a clear policy to offer service to Edison on the same non-discriminatory basis as CIG might be willing to offer service to other buyers in California. It is Edison's position that no applicant may acquire these assets who would exclude Edison (or any other significant California buyer desiring service) from competitive access to any service offered in the California market, for such exclusionary practice or policy might tend to substantially lessen competition or foster an illegal monopoly in contravention of the very laws now sought to be enforced.

"We have again read and considered the testimony of the CIG witnesses referred to by Edison at page 64 of its Brief filed herein on April 17, 1968, and find therein no statement of policy or position or intent to exclude Edison from consideration for service by a direct sale. The witnesses did not commit CIG to serve Edison directly, but also, they did not rule out the possibility of a direct sale. A direct sale to Edison is only one way to enter the California market and it would be a mistake, if not improper, for this Court to dictate how New Company should or should not attempt to compete."

IT IS FURTHER ORDERED that except to the extent granted by the foregoing amendments, all objections to the Court's Findings of Fact, Conclusions of Law and Opinion are overruled and denied, and as amended hereby the Court's tentative Findings of Fact, Conclusions of law and opinion entered on June 21, 1968, are hereby made the Findings of Fact, Conclusions of Law and Opinion of the Court. This order is hereby declared to be a final judgment from which appeal may be taken.

Entered this 29th day of August, 1968.

BY THE COURT:
/s/Hatfield Chilson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIVIL ACTION No. 143-57

UNITED STATES OF AMERICA,
Plaintiff,

— vs. —

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
Defendants.

ORDER
Dated November 7, 1968

By Order dated August 29, 1968, the Court entered its Findings of Fact, Conclusions of Law and Opinion. On September 6, 1968, El Paso Natural Gas Company filed a Motion to Amend the same to permit El Paso to retain its non-utility investments in Phillips Pacific Chemical Company and Pacific Northwest Realty Corporation in accordance with the agreement negotiated between El Paso and CIG.

Upon notice to all parties in interest, the motion was heard in open court and it appearing to the Court that the divestment of these investments is not essential to accomplish the Court's plan of divestment, nor is such divestment required by the mandate of the Supreme Court,

IT IS THEREFORE ORDERED that the motion is hereby granted and the Order of August 29, 1968, is hereby amended to include the following amendments to the Court's Findings of Fact, Conclusions of Law and Opinion:

1. The last sentence of the first full paragraph of page 26 of the Court's Findings of Fact, Conclusions of Law and Opinion is hereby stricken and in lieu thereof, the following sentence is substituted.
   "The investments above described are non-utility in nature and their divestment is not essential to the Court's plan of divestment nor is divestment required by the Supreme Court's mandate, and they may either be divested to New Company or retained by El Paso, as El Paso and the successful applicant selected by the Court may agree."
2. The last two sentences of the first full paragraph on page 12 and the first sentence of the first full paragraph on page 13 of the Appendix to the Court's Findings of Fact, Conclusions of Law and Opinion are hereby stricken and in lieu of each of these passages, the following sentence is substituted:
   "The Court has previously found that El Paso need not divest this asset."

IT IS FURTHER ORDERED that except as amended hereby, the Findings of Fact, Conclusions of Law and Opinion of the Court entered by the Court's Order of August 29, 1968, shall remain in full force and effect and this Order as amended hereby is declared to be a final judgment from which appeal may be taken.

Entered this 7th day of November, 1968.

BY THE COURT:
/s/Hatfield Chilson
United States District Judge

CIG (Exhibit 2)